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# UNDRIP and the Intervention: Indigenous Self-Determination, Participation, and Racial Discrimination in the Northern Territory of Australia

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# UNDRIP AND THE INTERVENTION: INDIGENOUS SELF-DETERMINATION, PARTICIPATION, AND RACIAL DISCRIMINATION IN THE NORTHERN TERRITORY OF AUSTRALIA

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*Abstract*: The adoption of the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") by the General Assembly in 2007 was a landmark achievement in the development of indigenous rights under international law, particularly through its unequivocal recognition of indigenous peoples' right to self-determination. That same year, Australia launched a comprehensive Intervention into Aboriginal communities in the Northern Territory, which purported to safeguard important human rights but was heavily criticized for its discriminatory and non-consultative approach. This article explores the meaning of self-determination under international law, now that the long debate over whether indigenous peoples are "peoples" has finally been resolved. It then uses the result of that analysis as the basis for a critique of Australia's methodology in the Intervention. The article argues that self-determination entails the right of a people to control their own affairs through freedom from discrimination and meaningful participation in decision-making, and that the scope of self-determination must be the same for indigenous peoples as for 'all peoples' under international law. When assessed against these criteria, it is clear that Australia's Intervention methodology fell well short of the requirements of empowerment inherent in these established and evolving international human rights standards. As Australia moves beyond the Intervention towards Stronger Futures it is imperative that the mistakes of an approach based on discrimination and a failure to foster genuine participation by Aboriginal peoples are not continued. The lessons of the Intervention are relevant for other states beyond Australia as the international community moves to implement the standards in UNDRIP.

## I. INTRODUCTION

> *Let us never forget this: . . . Australia's treatment of her aboriginal people will be the thing upon which the rest of the world will judge Australia and Australians–not just now, but in the greater perspective of history.*[1]

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[1] Extract from 1972 speech by former Australian Prime Minister Gough Whitlam, in E.G. WHITLAM, ON AUSTRALIA'S CONSTITUTION 301 (1977). As the author does not identify as either Australian or indigenous, the arguments in this article are presented from the perspective of an interested observer, in the style of Ian Brownlie, *The Rights of Peoples in Modern International Law*, *in* THE RIGHTS OF PEOPLES 1-16 (James Crawford ed., 1988).

Colonization, development, and modern "progress" have resulted in widespread marginalization for indigenous peoples in Australia[2] and around the world.[3] Virtually all indigenous peoples share common problems arising from systematic and persistent human rights violations, with indigenous status correlating closely with poverty.[4]

Against this background of disadvantage and oppression, the year 2007 saw the achievement of a "milestone of re-empowerment"[5] for indigenous peoples. On September 13, 2007, the United Nations ("UN") General Assembly ("GA") adopted the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP") by an overwhelming majority.[6] It was the culmination of an arduous drafting process that spanned more than two decades, with unprecedented participation by indigenous representatives.[7] As a result, the final declaration is a compromise between state and indigenous perspectives, rather than a purely state-driven instrument–unusual in international law.[8] Undoubtedly the most significant outcome is that UNDRIP is the first international legal instrument expressly to recognize that indigenous peoples have the right to self-determination.[9]

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[2] *See, e.g.*, Diane Otto, *A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia,* 21 SYRACUSE J. INT'L L. & COM. 65 (1995); Peter Grose, *Developments in the Recognition of Indigenous Rights in Canada: Implications for Australia?*, JAMES COOK U. L. REV. 68 (1997); Michael Dodson & Lisa Strelein, *Australia's Nation-Building: Renegotiating the Relationship Between Indigenous People and the State*, 24 U. NEW S. WALES L.J. 826 (2001); Julie Cassidy, *The Legacy of Colonialism*, 51 AM. J. COM. L. 409, 409 (2003); Deirdre Howard-Wagner, *Restoring Social Order Through Tackling 'Passive Welfare': The Statutory Intent of the Northern Territory National Emergency Response Act 2007* (Cth) *and Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), 19 CURRENT ISSUES IN CRIM. JUST. 243 (2007); Jennifer Martiniello, *Howard's New Tampa: Aboriginal Children Overboard,* 26 AUST. FEMINIST L.J. 123 (2007); Michael Murphy, *Representing Indigenous Self-Determination,* 58(2) U. TORONTO L. J. 185 (2008); John Chesterman & Heather Douglas, *Law on Australia's Northern Frontier: The Fall and Rise of Race,* 24 CAN. J. L. & SOC'Y 69 (2009).

[3] *See* INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 74TH CONFERENCE (the Hague, 2010) 834-923 [hereinafter ILA REPORT].

[4] *See generally*, Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Perspective,* 12 HARV. HUM. RTS. J. 57, 98 (1999); Rodolfo Stavenhagen, *The Rights of Indigenous Peoples: Closing a Gap in Global Governance,* 11 GLOBAL GOVERNANCE 17 (2005); Asbjørn Eide, *Rights of Indigenous Peoples–Achievements in International Law During the Last Quarter of a Century*, 37 NETHERLANDS Y.B. OF INT'L L. 155, 184 (2006). For further discussion of "aboriginal syndrome," see Cassidy, *supra* note 2.

[5] Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT'L L. 1141, 1142 (2008).

[6] U.N. Doc. A/RES/61/295 (Sept. 13, 2007). The vote breakdown for this resolution was 143 in favor, 4 against (Australia, Canada, New Zealand, United States), and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, Ukraine).

[7] *See, e.g.*, ILA Report, *supra* note 3, at 836-40.

[8] *See, e.g.*, Maivân Lâm, *Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination,* 25 CORNELL INT'L L. J. 603, 621 (1992); KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW 8 (2002).

[9] United Nations Declaration on the Rights of Indigenous Peoples art. 3, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP].

Although UNDRIP is not legally binding, this development provides important legal recognition of a struggle for empowerment that had previously been largely political in nature,[10] and offers an opportunity to reconcile competing understandings of the content and scope of the right of self-determination in international law.[11]

The first purpose of this paper is to take up that opportunity by examining and defining the meaning of self-determination now that it has been extended to indigenous peoples in UNDRIP. While there is vast literature covering the development of the draft Declaration, and the question of whether or not self-determination would ultimately be included (and in what form), there has been comparatively little analysis of what self-determination actually means–for indigenous peoples specifically and for "all peoples" more generally–now that it is unequivocally recognized in UNDRIP.[12] This article aims to contribute to the literature by arguing that the meaning of self-determination following UNDRIP's adoption is consistent with traditional understandings of the right as recognized for "all peoples,"[13] not at odds with them. To clear away some of the controversy around indigenous self-determination and facilitate its implementation on a practical level, self-determination can be defined quite simply as a people's right to control its own affairs through freedom from discrimination and meaningful participation in decision-making.

The second purpose of the article is to apply this interpretation to important events unfolding in Australia. Specifically, the article uses these evolving international standards of self-determination as the criteria for a critical assessment of key aspects of the methodology used by the Australian federal government in its intervention into Aboriginal communities in the

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[10] Chris Tennant, *Indigenous Peoples, International Institutions, and the International Legal Literature from 1945-1993,* 16 HUM. RTS. Q. 1, 42-45 (1994).

[11] Caroline Foster, *Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples*, 12 EUR. J. INT'L L. 141 (2001).

[12] Exceptions include various chapters in REFLECTIONS ON THE U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (Stephen Allen & Alexandra Xanthaki eds., 2011) [hereinafter REFLECTIONS ON THE UNDRIP]; Karen Engle, *On Fragile Architecture: The U.N. Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 EUR. J. INT'L L. 141 (2011); Lorie Graham & Siegfried Wiessner, *Indigenous Sovereignty, Culture, and International Human Rights Law*, 110 S. ATLANTIC Q. 403 (2011); Siegfried Wiessner, *Indigenous Self-Determination, Culture, and Land: A Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples, in* INDIGENOUS RIGHTS IN THE AGE OF THE UN DECLARATION 31, 44-7 (Elvira Pulitano ed., 2012).

[13] *See* International Covenant on Economic, Social and Cultural Rights art. 1(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. *See also* the African Charter on Human and Peoples' Rights art. 20(1), June 27, 1981, 1520 U.N.T.S. 363 (recognizing the "unquestionable and inalienable right to self-determination" of all peoples). The UN Charter refers to the "principle of equal rights and self-determination of peoples" in arts. 1(2) and 55.

Northern Territory of Australia ("NT"). Known as the NT National Emergency Response ("NTER") or simply "the Intervention," this wide-ranging initiative was launched in 2007, the same year that UNDRIP was adopted. The Intervention was triggered by the report of an inquiry into child abuse in remote Aboriginal communities known as the Little Children Are Sacred Report.[14] The report documented the desperate living conditions and general social breakdown that had precipitated the serious child abuse problem, and predicted an impending disaster for Australia if urgent action was not taken to address entrenched disadvantage in indigenous communities in NT.[15]

In response, Australia implemented a complicated legislative package introducing reforms that touched on almost all aspects of everyday life in the communities affected. The federal government said the Intervention would take important steps to protect children, to implement Australia's obligations under human rights treaties, and to advance the human rights of indigenous peoples suffering the "crisis of community dysfunction."[16] There is no disputing that Australia was faced with an extremely serious and complex situation, and that drastic action was urgently needed to protect the rights of Aboriginal peoples, particularly children and women, in NT communities. In that respect the Intervention represented an encouraging sign that the federal government was willing to take these problems seriously and commit significant resources to making improvements, to bring conditions in NT into line with its obligations under international human rights law.

Unfortunately, Australia's methodology and approach were seriously flawed from a human rights perspective, and any initial optimism soon gave way to intense criticism of the Intervention. The criticism centered on the suspension of the Racial Discrimination Act 1975 ("RDA"),[17] and the fact that the discriminatory measures were imposed wholly without consultation. In other words, by UNDRIP standards, both the foundations for self-determination in the definition articulated above were absent.

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[14] REX WILD QC & PAT ANDERSON, REPORT OF THE NT BOARD OF INQUIRY INTO THE PROTECTION OF ABORIGINAL CHILDREN FROM CHILD ABUSE, AMPE AKELYERNEMANE MEKE MEKARLE: LITTLE CHILDREN ARE SACRED (2007), *available at* http://www.inquirysaac.nt.gov.au/pdf/bipacsa_final_report.pdf [hereinafter LITTLE CHILDREN ARE SACRED].

[15] LITTLE CHILDREN ARE SACRED, *supra* note 14, at 6.

[16] Commonwealth Games Association ("CGA"), House of Representatives, *Northern Territory National Emergency Response Bill 2007* Explanatory Memorandum, 76, *available at* http://www.austlii.edu.au/au/legis/cth/bill_em/ntnerb2007541/ memo_0.html (last visited Apr. 7, 2011) (hereinafter NTERB Explanatory Memorandum), 76.

[17] *Northern Territory Emergency Response Act 2007* [hereinafter NTERA] (Cth) s 132(2) (Austl.). The Intervention also overrode contrary provisions of Northern Territory anti-discrimination laws. NTERA s 133(2). This article solely considers the federal act.

NTER was subsequently amended in an attempt to address these concerns,[18] but many believe the redesign did not remedy the destructive effects of the initial approach.[19] Now, five years later, the life of NTER is ostensibly over, as the key legislated areas were set to expire in August 2012.[20] Australia has just passed new legislation to replace NTER,[21] having undertaken the Stronger Futures in the Northern Territory consultations in June-August 2011.[22] Accordingly, it is timely to step back and re-examine why NTER approach was not the answer, in light of UNDRIP.

This is not simply a retrospective exercise in finger-pointing. The new legislation has a life-span of 10 years, with the first independent review scheduled for 3 years after commencement.[23] Significant resources have been committed to its implementation by the federal and Northern Territory ("NT") governments, but serious concerns remain over the processes and methods by which the legislation was developed and approved. As Australia is on the threshold of the next phase of its campaign to improve living conditions in NT communities, it is imperative that the methodological mistakes of the Intervention are not repeated, and that UNDRIP is used as guidance to ensure that the positive intentions behind the Intervention and

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[18] *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) (Austl.) [hereinafter WWRDA].

[19] *See, e.g.*, Alison Vivian, *NTER Redesign Consultation Process: Not Very Special*, 14 AUSTRALIA INDIGENOUS L. REV. 46 (2010); Alastair Nicholson et al., *Will They Be Heard? A Response to NTER Consultations: June to August 2009* (2009); Amnesty International, Submission No. 19 to Senate Standing Committee on Community Affairs (Feb. 11, 2010), *available at* http://www.aph.gov.au/senate /committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/submissions/sub19.pdf; Rights and Equal Opportunities Commission (HREOC), *The Suspension and Reinstatement of the RDA and Special Measures in NTER* (2011), *available at* http://www.hreoc.gov. au/racial_discrimination/publications/rda-nter/NTERandRDAPublication12%20December2011.pdf [hereinafter HREOC Report on RDA and Special Measures].

[20] In 2009 NTER transitioned to a "development" phase under the Closing the Gap in the Northern Territory National Partnership Agreement. For an overview, see CGA, *Closing the Gap: Prime Minister's Report* (2011), *available at* http://www.fahcsia.gov.au/sa/indigenous/pubs/closing_the_gap/ 2011_ctg_pm_report/Documents/2011_ctg_pm_report.pdf [hereinafter *Closing the Gap: Prime Minister's Report*].

[21] Three related bills were referred to the Senate Standing Committee on Community Affairs on November 25, 2011, and remained open for submissions until February 1, 2012: *Stronger Futures in the Northern Territory Bill 2011* (Cth) (Austl.); *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011* (Cth) (Austl.), and *Social Security Legislation Amendment Bill 2011* (Cth) (Austl.). The Committee reported on March 14, 2012 and the bills were passed by the Senate at the third reading in the early hours of June 29, 2012.

[22] CGA, STRONGER FUTURES IN THE NORTHERN TERRITORY: DISCUSSION PAPER (June 2011), *available at* http://www.indigenous.gov.au/wp-content/uploads/2011/06/s_futures_discussion_paper.pdf; CGA, STRONGER FUTURES IN THE NORTHERN TERRITORY: POLICY STATEMENT (November 2011), *available at* http://www.indigenous.gov.au/wp-content/uploads/2011/11/Stronger_Futers_policy_statement _nov2011.pdf [sic] [hereinafter CGA, STRONGER FUTURES POLICY STATEMENT]; CGA, STRONGER FUTURES IN THE NORTHERN TERRITORY: REPORT ON CONSULTATIONS (Oct. 2011), *available at* http://www.indigenous.gov.au/wp-content/uploads/2011/ 10/consult_1710111.pdf.

[23] *See* STRONGER FUTURES IN THE NORTHERN TERRITORY ACT 2012 (Cth), ss 117, 118 (Austl.).

the *Stronger Futures* package can be built upon to maximum effect. There are valuable lessons to be learned about the importance of fostering self-determination, of relevance not just to Australia, but in the context of indigenous-state relations anywhere.

Section II sets up the criteria for assessing the Australian approach by exploring the meaning of self-determination for indigenous peoples under UNDRIP. It briefly considers different understandings of self-determination before analyzing the content and scope of self-determination under UNDRIP. It argues that the core normative foundations on which indigenous peoples' right to self-determination depends are the same foundations underpinning the right of self-determination long recognized for "all peoples" under international law: the right to participation and the right to be free from discrimination. Both are well-established rights in themselves, but UNDRIP demands a higher standard of participation in decision-making in the indigenous context, over and above the usual right to political participation. The article argues that self-determination under UNDRIP is equivalent in scope to "traditional" self-determination. It is unacceptable and unnecessary to restrict it to a lesser form of self-determination than that recognized for "all peoples" under established international law. Ultimately, the article argues that the right of self-determination can be defined as a people's right to control its own affairs through freedom from discrimination and meaningful participation in decision-making.

Having articulated self-determination in this manner, the purpose of Section III is to use those two fundamental components–non-discrimination and participation–as the benchmark for assessing Australia's approach in NTER against established and evolving international standards. In doing so, the article aims to set NTER within the framework of the wider international human rights context, and to demonstrate why the Stronger Futures legislation package and other initiatives must be implemented in alignment with that context if they are to succeed.

Section III starts by introducing the Intervention and outlining the two major themes of criticism that form the parameters of discussion, concluding that the approach taken by the Australian government in NTER lacked both of the normative foundations for self-determination set out in section II. It then builds on this argument by examining each of those international legal foundations in more detail, and applying them to the domestic NTER context. First, the article looks at the right to non-discrimination, including the role of special measures, and then it discusses the right to participation in decision-making, elaborating on the important point that UNDRIP

transcends established participatory rights. Judged against the criteria of self-determination based on non-discrimination and participation in decision-making, NTER assessment shows that in its choice of methods Australia failed to live up to contemporary international standards of engagement with its indigenous peoples, and was out of step with the messages of empowerment and respect embodied in UNDRIP.

Section IV provides a preliminary assessment of the Stronger Futures initiative against the same criteria, to see whether Australia has taken the criticism of its NTER methodology on board. The end of the NTER period provided an opportunity for a fresh start and a renewed commitment to fostering genuine engagement. Early indications about the Stronger Futures consultations gave some cause for cautious optimism about an improved approach, but there is also troubling evidence suggesting little has changed. While it is perhaps too early to be categorical in evaluating the methodology used in the development and implementation of the new legislation, the importance of not repeating the mistakes of NTER cannot be overstated. Finally, Section V concludes by drawing together all of the strands of my argument argument.

Before proceeding, it is worth pausing to clearly define the limits of discussion. First, the author acknowledges that converting aspirations to reality is easier said than done. This contribution is presented from an academic international legal perspective, not from a practical domestic policy perspective, and the emphases and observations will naturally reflect that position. In particular, the article does not address the wider debates in Australia or elsewhere about improving state-indigenous relations, or attempt to provide all the answers to implementation of UNDRIP. Nonetheless, it is hoped that critical scholarship and the articulation of a simple working definition of self-determination based squarely on established rights can make some contribution towards those goals.

Second, the application of international human rights criteria to assess NTER is limited to the methods employed once Australia decided to act. The author does not deny the very real need for action as a matter of international human rights law, and does not privilege concerns about process over the violations of other substantive rights that NTER purported to address. The argument is that once Australia had decided to take action, it should have maximized the opportunity for real change by doing things properly, in line with established and evolving standards. Instead, there is

evidence that the discriminatory and paternalistic approach taken was a large factor in undermining NTER's own effectiveness.[24]

Third, the article generally does not engage with the substance and detail of the domestic legislation, except where it illuminates an argument about Australia's overall methodology and approach. This is partly because the 500-page suite of NTER legislation (now replaced and supplemented by some 300 pages of *Stronger Futures* legislation) is simply too comprehensive in scope to cover each of the detailed reforms in any useful way here. Primarily, however, it is because the focus is on evaluating the methodology, from an international human rights perspective, rather than assessing the ins and outs of individual policies and whether or not each one might be effective. No doubt there have been provisions among the overall package that do make welcome changes and have the support of Aboriginal people in NT, but again, it cannot be argued that any such positive effects have come about because Australia proceeded the way it did, or that a discriminatory approach was necessary for those benefits to be realized.

## II. INDIGENOUS PEOPLES' RIGHT TO SELF-DETERMINATION

### *A. Self-Determination is the River in which All Other Rights Swim*[25]

The adoption of UNDRIP by the GA in 2007 was described as a "beacon of hope" for indigenous peoples around the world.[26] Before 2007, only two international legal instruments contained any specific recognition of indigenous rights–International Labor Organization (ILO) Conventions 107[27] and 169[28]–and both demonstrate a markedly top-down, state-focused perspective.[29] UNDRIP represents a significaSnt change of approach. It

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[24] National Territory Emergency Response ("NTER") Review Board, REPORT OF THE NTER REVIEW BOARD (Oct. 13, 2008), *available at* http://www.nterreview.gov.au/ (last visited Apr. 2, 2011) [hereinafter REVIEW BOARD REPORT].

[25] Craig Scott, *Indigenous Self-Determination and Decolonization of the International Imagination: A Plea*, 18 HUM. RTS. Q. 814, 814 (1996) (quoting Michael Dodson).

[26] Russel Barsh, *Indigenous Peoples and the UN Commission on Human Rights: A Case of the Immovable Object and the Irresistible Force*, 18 HUM. RTS. Q. 782, 808 (1996) (quoting Erica-Irene Daes).

[27] Indigenous and Tribal Populations Convention 1957 (entered into force June 2, 1959).

[28] Indigenous and Tribal Peoples Convention 1989 (entered into force Sept. 5, 1991).

[29] For detailed discussion, *see* ALEXANDRA XANTHAKI, INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE AND LAND 49-101 (2007); Andrew Erueti, *The International Labour Organization and the Internationalisation of the Concept of Indigenous Peoples, in* Allen & Xanthaki eds., *supra* note 12, at 93-120. Convention 107 in particular was notoriously assimilationist. It has largely been superseded by Convention 169, which was undoubtedly an improvement and has had some impact beyond its limited membership (just 22 parties as of July 8, 2012), but it still retains a decidedly state-driven flavor and does not enjoy widespread support from indigenous representatives. *See* Tennant, *supra* note 10; Victoria Tauli-Corpuz, *Paper Presented at the Indigenous Peoples' Summit: The Challenges of Implementing the UN Declaration on the Rights of Indigenous Peoples* (2008), *available at*

does not create wholly new rights that do not exist in other instruments, but pulls together pre-existing rights of general and specific application and spells out how they relate to the specific conditions of indigenous peoples.[30] As such, new applications of existing rights will emerge. It goes beyond simply a synthesis of current practice,[31] adding new nuances and advancing indigenous rights with the inclusion of collective rights as well as individual ones.[32] Above all, UNDRIP treads new ground with its strong themes of empowerment and partnership, departing from the traditional state-driven approaches seen in the ILO Conventions.

Undoubtedly, UNDRIP's most significant contribution to international law is the unequivocal recognition in article 3 that indigenous peoples have the right to self-determination.[33] The International Court of Justice ("ICJ") has described self-determination as the "need to pay regard to the freely expressed will of peoples,"[34] but for decades there has been enormous controversy over the meaning of "peoples."[35] The language of UNDRIP

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http://www.tebtebba.org/index.php?option=com_docman&task=cat_view&gid=16&Itemid=27 (last visited Apr. 1, 2011).

[30] Rodolfo Stavenhagen, *Making the Declaration on the Rights of Indigenous Peoples Work: The Challenge Ahead, in* Allen & Xanthaki (eds.), *supra* note 12, at 147-70; Special Rapporteur, S. James Anaya, Promotion and Protection of All Human Rights, U.N. Doc. A/HRC/9/9/ (Aug. 11, 2008) [hereinafter "Anaya Report 2008"]. For discussion about the need for a special regime for indigenous rights, beyond universal or minority rights, *see, e.g.,* Xanthaki, *supra* note 29, at 133; Richard Falk, *The Rights of Peoples, in* Brownlie, *supra* note 1, at 17-37; Cassidy, *supra* note 2; E. Cobb, *Fifty Thousand Years Old and Still Fighting For Rights: The Continuing Struggle of Australia's Indigenous Population*, 38 GA. J. INT'L & COMP. L. 375 (2010); Tauli-Corpuz, *supra* note 29; Mauro Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous People*, 58 INT'L & COMP. L.Q. 957 (2009). For the contrary view, see, e.g., Jeff Corntassel & Tomas Primeau Hopkins, *Indigenous 'Sovereignty' and International Law: Revised Strategies for Pursuing 'Self-Determination'*, 17 HUM. RTS. Q. 343 (1995).

[31] Barsh, *supra* note 26, at 808 (quoting Daes); Helen Quane, *The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights?*, *in* REFLECTIONS ON THE UNDRIP, *supra* note 12, at 259-88.

[32] XANTHAKI, *supra* note 29, at 107-09; Barelli, *supra* note 30, at 963; Cindy Holder & Jeff Corntassel, *Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights*, 24 HUM. RTS. Q. 126 (2002).

[33] Indigenous peoples' strong desire for recognition of their right to self-determination was both the driving force behind the development of UNDRIP and the most controversial aspect of debate. *See* Lâm, *supra* note 8, at 608; Erica-Irene Daes, *An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations*, 21 CAMBRIDGE REV. OF INT'L AFF. 7, 14 (2008); Eide, *supra* note 4; Xanthaki, *supra* note 29, at 110-12; Stavenhagen, *supra* note 4; S. James Anaya & Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment*, JURIST LEGAL NEWS AND RESEARCH–FORUM, *available at* http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php, (last visited Oct. 12, 2011).

[34] Western Sahara, Advisory Opinion, 1975 I.C.J. 12, para. 59 (Oct. 16) [hereineafter Western Sahara].

[35] *See generally* S. James Anaya, *Contemporary Definition of the International Norm of Self-Determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 131 (1993) [hereinafter Anaya (1993)]; ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT, 121-28 (1994); Wiessner, *supra* note 4; S. James Anaya, *Self-Determination as a Collective Human Right Under Contemporary*

expressly confirms for the first time that indigenous peoples are included within the meaning of "all peoples" that are entitled to self-determination under international law.

The purpose of this section is not to undertake a comprehensive review of the right to self-determination under international law; nor of the rights of indigenous peoples or minorities generally; nor of the unusual development of UNDRIP itself. Each of these topics has been discussed extensively in the literature.[36] The objective here is to focus on the meaning of self-determination now that UNDRIP has been adopted, drawing on competing formulations and historical areas of contention and consensus where they are useful. The aim is to offer a simple articulation of the right to self-determination, derived from an examination of the background, content, and context of UNDRIP. The simplicity of the definition advanced is not intended to mask the complexity of this area of law, but to translate self-determination into a form that is less abstract and less controversial, and thus facilitates its practical implementation.

To provide some background to the indigenous self-determination debate, the next section outlines briefly the competing understandings of self-determination during UNDRIP's drafting process.

### *A. Competing Understandings of Self-Determination*

For indigenous peoples, self-determination is the "mother of all rights."[37] It is seen as a necessary foundation for indigenous peoples' enjoyment of all the other rights they claim,[38] and the only solution to their

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*International Law, in* OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION 3-18 (Pekka Aikio & Martin Scheinin eds., 2000) [hereinafter Anaya (2000)]; Kristian Myntti, *The Right of Indigenous Peoples to Self-Determination and Effective Participation, in* Aikio & Scheinin (eds.) at 85-130.

[36] *See, e.g.*, Brownlie, *supra* note 1; MODERN LAW OF SELF-DETERMINATION (Christian Tomuschat ed., 1993); Tennant, *supra* note 10; ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL (1995); Julian Burger, *The United Nations Draft Declaration on the Rights of Indigenous Peoples*, 9 ST. THOMAS L. REV. 209 (1996); Aikio & Scheinin (eds.), *supra* note 35; KNOP, *supra* note 8; PATRICK THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS (2002); S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2d ed. 2004); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 108-28 (2d ed. 2006); Eide, *supra* note 4; XANTHAKI, *supra* note 29; UNIVERSAL MINORITY RIGHTS (Marc Weller ed., 2007); Wiessner, *supra* notes 4; Weissner, *supra* note 5; Daes, *supra* note 33; ILA REPORT, *supra* note 3, at 834-923.

[37] S. James Anaya, *Superpower Attitudes Towards Indigenous Peoples and Group Rights*, *in* PROCEEDINGS OF THE ANNUAL MEETING, AMERICAN SOCIETY OF INTERNATIONAL LAW 251, 257 (1999)

[38] Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, The Situation of Indigenous Peoples in Australia, U.N. Doc. A/HRC/15/37/Add.4, para. 54 (Mar. 4, 2010) (by S. James Anaya) [hereinafter Anaya Report 2010]; HRC Res., General Comment No 12: Article 1 (The right to self- determination of peoples), U.N. Doc. HRI/GEN/1/Rev.7, 134 (1984); Lubicon Lake Band v. Canada, HRC, U.N. Doc A/42/40, para. 13.3 (March 26, 1984); Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Study on the Problem of Discrimination Against Indigenous Populations: Final Report, Part III, U.N. Doc.

problems:[39] for them, self-determination is the pillar on which UNDRIP rests.[40] Of course, the interests of indigenous peoples around the world are not identical, and specific demands will be diverse, but generally there has been remarkable consensus.[41] The words most frequently used to translate self-determination into indigenous languages reflect concepts of freedom, integrity and respect.[42] In essence, the many aspirations and desires expressed by indigenous peoples under the umbrella of self-determination[43] can be summarized as "the right to be in control of their own destinies under conditions of equality."[44]

The persistent claims by indigenous peoples, framed in the language of self-determination, have been met with sustained opposition from states.[45] Traditionally, states have recognized self-determination as the right of peoples under colonial, foreign, or alien occupation to independence.[46] Self-determination has typically been seen as a right of whole populations, rather than a right of subgroups within a state.[47] The "specter of secession" looms large: states fear that recognizing indigenous self-determination will

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E/CN.4/Sub.2/1983/21/Add.8 para. 269 (Sept. 30, 1983) (by José Martínez-Cobo) [hereinafter Martínez-Cobo Report 1983].

[39] Marjo Lindroth, *Indigenous-State Relations in the UN: Establishing the Indigenous Forum*, 42 POLAR RECORD 239, 244 (2006).

[40] Catherine Brölmann & Marjoleine Zieck, *Some Remarks on the Draft Declaration on the Rights of Indigenous Peoples*, 8 LEIDEN J. INT'L L. 103, 104 (1995); United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/30, para. 27 (Aug. 17, 1994).

[41] Grose, *supra* note 2, at 72.

[42] Erica-Irene Daes, *The Spirit and Letter of the Right to Self-Determination of Indigenous Peoples: Reflections on the Making of the United Nations Draft Declaration, in* Aikio & Scheinin (eds.), *supra* note 35, at 67-83, 79.

[43] *See, e.g.,* Lindroth, *supra* note 39, at 244; Daes, *supra* note 33, at 17; ILA Report, *supra* note 3, at 846-50; Anaya & Wiessner, *supra* note 33.

[44] Dann v. United States, Case 11.140, Inter-Am. Comm'n. H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 5 rev. 1, para. 64 (2002); Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, INTER-AM. COMM'N. H.R., REPORT NO. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. para. 55 (2004).

[45] For discussion of the major objections, see Patrick Thornberry, *Self-Determination and Indigenous Peoples, in* Aikio & Scheinin (eds.), *supra* note 35, at 39-64, 47-57.

[46] *See, e.g.*, Declaration on Granting Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. GAOR (Dec. 14, 1960) [hereinafter Colonial Declaration]; Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States, G.A. Res. 2625 (XXV), (Oct. 24, 1970) [hereinafter Friendly Relations Declaration]; Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, G.A. Res. 50/6, U.N. Doc. A/RES/50/6 (Nov. 9, 1995); Universal Realization of the Right of Peoples to Self-Determination, G.A. Res. 58/161, U.N. Doc. A/RES/58.161 (March 2, 2004). *See also* Namibia, Advisory Opinion, 1971 I.C.J. 16 (June 21, 1971); Western Sahara, *supra* note 34; Cassese, *supra* note 36; THE CREATION OF STATES IN INTERNATIONAL LAW, *supra* note 36, at 108-28.

[47] *See* THE CREATION OF STATES IN INTERNATIONAL LAW, *supra* note 36; Cassese, *supra* note 36, at 334-35; HIGGINS, *supra* note 35; compare *Reference re Secession of Quebec* [1998] 2 SCR 217, para. 124 (Can.).

undermine their sovereignty and territorial integrity, leading to fragmentation of the world order through the formation of new micro-states.[48]

In traditional conceptions of self-determination, a distinction is often made between so-called "internal" and "external" self-determination.[49] Internal self-determination, according to Daes, is "best viewed as entitling a people to choose their political allegiances, to influence the political order in which they live, and to preserve their cultural, ethnic, historical or territorial identity."[50] Broadly speaking, this encompasses the majority of indigenous claims to self-determination. External self-determination, by contrast, is "the act by which a people determines its future international status and liberates itself from 'alien' rules."[51] Many authors and states equate external self-determination with the creation of an independent state.[52]

Given the semantic blockage that has resulted from different interpretations of self-determination,[53] some commentators have argued that indigenous claims fall outside the meaning of self-determination in international law.[54] They argue that what indigenous peoples actually seek is something different,[55] and that they would do better to rely on other, more relevant language in pursuing their cause.[56] Others argue that indigenous claims are not served by Western notions at all.[57]

These arguments ignore not only the immense political significance that indigenous peoples attach (for better or worse) to their pursuit of self-determination,[58] but also the evolving nature of international legal

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[48] Wiessner, *supra* note 4, at 116. See General Assembly Adopts Declaration on Rights of Indigenous Peoples, U.N. Doc. GA/10612 (Sept. 13, 2007) [hereinafter Declaration Press Release].

[49] *See, e.g.,* Cassese*, supra* note 36, at 67-140; Committee on the Elimination of Racial Discrimination, General Recommendation No. XXI on the Right to Self-Determination, U.N. Doc. A/51/18 (1996); Myntti*, supra* note 35, at 103-09; *Reference re Secession of Quebec*, *supra* note 47, at para. 126.

[50] Erica-Irene Daes, Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1993/26/Add. 1 (1993), para 19.

[51] *Id.* at para 17.

[52] *See* XANTHAKI, *supra* note 29, at 146, 152; Anaya, *supra* note 37, at 258; Higgins, *supra* note 35, at 124.

[53] David Makinson, *Rights of Peoples: A Logician's Point of View, in* Brownlie, *supra* note 1, at 69-92, 757.

[54] *See, e.g.*, Corntassel & Hopkins, *supra* note 30.

[55] *See, e.g.*, Falk, *supra* note 30.

[56] *See, e.g.*, Corntassel & Hopkins, *supra* note 30; Kyla Reid, *Against the Right to Self-Determination* (2011), *available at* http://ssrn.com/abstract=1905257, (last visited Oct. 13, 2011) (Working Paper).

[57] Gary Johns, *The Poverty of Self-Determination*, *in* WAKING UP TO DREAMTIME: THE ILLUSION OF ABORIGINAL SELF-DETERMINATION 15-34; Trevor Satour, *The New Authoritarian Separatism*, *in* WAKING UP TO DREAMTIME: THE ILLUSION OF ABORIGINAL SELF-DETERMINATION 35-57 (G. Johns ed., 2007); Otto, *supra* note 2.

[58] Anaya & Wiessner, *supra* note 33.

concepts,[59] and the importance of equality.[60] The better view is that the widespread fear among states of indigenous secession is unreasonable and overstated.[61] It should not prevent development of all peoples' recognized right to self-determination,[62] now that its existence for indigenous peoples is beyond doubt. This argument is based on a consideration of UNDRIP itself within the context of established international law.

### *B. The Meaning of Self-Determination Under UNDRIP*

Self-determination is not defined in UNDRIP. In summary, this Section argues that the content of self-determination under UNDRIP can be distilled to two essential prerequisites: meaningful participation in decision-making, and freedom from discrimination. These foundations are tied together by the overriding element of empowerment that permeates the text, to give a definition of self-determination that amounts to the right of indigenous peoples to control their own affairs. As such, self-determination under UNDRIP reflects pre-existing human rights, but it adds an extra element of normative content that has previously been lacking for indigenous peoples. It is not a completely new right[63] or even a radical re-interpretation of self-determination as traditionally understood,[64] but a natural evolution that is consistent with existing international law.[65] Interpreted this way, it becomes clear that self-determination must not be treated as synonymous with secession in all cases, and that the scope of self-determination in the indigenous context must be read as equal to its scope for all other peoples. The next Sections address, in turn, the content and scope of the right to self-determination under UNDRIP.

#### *1. Content of the Right to Self-Determination Under UNDRIP*

The right to self-determination in Article 3 of UNDRIP is framed almost identically to common Article 1 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and the International

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[59] *See* XANTHAKI, *supra* note 29, at 149-51; HIGGINS, *supra* note 35; Benedict Kingsbury, *Reconstructing Self-Determination: A Relational Approach, in* Aikio & Scheinin (eds.), *supra* note 35, at 19-37.

[60] Otto, *supra* note 2, at 92; Barsh, *supra* note 26; XANTHAKI, *supra* note 29, at 131-32.

[61] Anaya, *supra* note 37; Scott, *supra* note 25. This worry on the part of states has been described as "something of a red herring" by Julian Burger, *The UN Declaration on the Rights of Indigenous Peoples: From Advocacy to Implementation, in* REFLECTIONS ON THE UNDRIP, *supra* note 12, at 41-59, 45.

[62] *See generally* Cassese, *supra* note 36, at 348-51.

[63] Compare statements by Ecuador and the UK cited in Quane, *supra* note 31 (Ecuador and UK claim this is an entirely new right).

[64] Makinson, *supra* note 53, at 75.

[65] ANAYA REPORT 2008, *supra* note 30; XANTHAKI, *supra* note 29, at 131-76; Barelli, *supra* note 30.

Covenant on Civil and Political Rights ("ICCPR"), which in turn came from General Resolution 1541 (XV) of 1960, the "Colonial Declaration:"

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[66]

Article 4 of UNDRIP goes on to provide that:

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

It is explicit in these provisions that the right to self-determination entails an element of political freedom, as well as the free pursuit of economic, social, and cultural development, and that its exercise may be closely linked to autonomy or self-government.

Before analyzing what is included within the meaning of self-determination, it is important to set the parameters of what must be left out. During the drafting process there was a tendency for indigenous representatives to treat self-determination as an expansive catch-all right,[67] and some saw all of UNDRIP's provisions as part of self-determination.[68] Many indigenous claimants see their rights to lands and natural resources, and respect for cultural integrity, as integral aspects of self-determination.[69]

There is no denying that the exercise of self-determination may be linked to these other important rights,[70] but subsuming them into the definition of self-determination itself is not the answer. Expanding the meaning of self-determination to cover everything dilutes its power,[71] while

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[66] In the ICCPR, ICESCR, and the Colonial Declaration, "indigenous" is replaced by "all".

[67] XANTHAKI, *supra* note 29.

[68] Foster, *supra* note 11, at 150.

[69] *See, e.g.*, Dann v. United States, *supra* note 44; John Henriksen, *The Right of Self-Determination: Indigenous Peoples versus States, in* Aikio & Scheinin (eds.), *supra* note 35, at 131-41, 136; Ted Moses, *The Right of Self-Determination and its Significance to the Survival of Indigenous Peoples*, *in* Aikio & Scheinin (eds.*), supra* note 35, at 155-177, 162; Quane, *supra* note 31, at 262.

[70] ICCPR Common Article 1(2); ICESCR common art. 1(2); UNDRIP, art. 3; Mahuika et al. v. New Zealand, HRC, U.N. Doc. CCPR/C/70/D/547/1993, para. 9.2 (Nov. 16, 2000); Lubicon Lake Band v. Canada, *supra* note 38 at para. 13.4; Human Rights Council, *General Comment No. 12*, *supra* note 38; *Diergaardt v Namibia*, Human Rights Council, U.N. Doc. CCPR/C/69/D/760/1996 (2000), para. 10.3; Daes, *supra* note 33, at 8; United Nations Permanent Forum on Indegnous Issues ("NPFII"), *State of the World's Indigenous Peoples*, U.N. Doc. ST/ESA/328 16 (2009); Alison Vivian, *Some Human Rights Are Worth More Than Others: The Northern Territory Intervention and the Alice Springs Town Camps*, 35 ALT. L.J. 13 (2010).

[71] Corntassel & Hopkins, *supra* note 30, at 361; XANTHAKI, *supra* note 29, at 152.

simultaneously draining power from other rights that are separately recognized as worthy of protection in themselves.[72] While it may be that the principle of self-determination is capable of encapsulating all these aspirations, the right as it has been recognized in UNDRIP will necessarily be more tightly confined.[73]

Alexandra Xanthaki advocates striking a balance between a maximalist approach to self-determination, which sees it as "all things to all men,"[74] and a minimalist one, which prevents its development beyond the contexts in which it has traditionally been recognized.[75] She suggests that cultural and socio-economic rights should be considered separately from self-determination.[76] This view is shared by Higgins[77] and the United Nations Human Rights Committee ("HRC").[78]

Besides cultural and socio-economic rights, there has also been extensive discussion about autonomy and self-government in the context of indigenous self-determination.[79] Some commentators have argued that they are essential components of the right,[80] or even that the indigenous goal of self-determination is autonomy and self-government.[81]

However, the President of the ICJ, in his concurring declaration in the *Namibia* case, made the point that being restricted to internal autonomy and local self-government is effectively a denial of self-determination as it is envisaged in the Charter.[82] In other words, autonomy and self-government do not amount to self-determination. Nor are they simply component parts of self-determination: the structure of Articles 3 and 4 reveals that autonomy and self-government are separate rights in and of themselves, which may be

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[72] XANTHAKI, *supra* note 29, at 154.

[73] Self-determination exists as political principle, legal principle, and legal right. *See, e.g.,* Crawford, *supra* note 36, at 108-28; XANTHAKI, *supra* note 29, at 143, 155-57; KNOP, *supra* note 8, at 29-49. The shift from "principle" to "right" first appeared in 1960. Colonial Declaration, *supra* note 46. *See* HIGGINS, *supra* note 35, at 114.

[74] HIGGINS, *supra* note 35, at 128.

[75] XANTHAKI, *supra* note 29, at 146-54.

[76] *Id.* at 154.

[77] HIGGINS, *supra* note 35, at 125.

[78] *See* Human Rights Committee ("HRC"), General Comment No. 23: Article 27 (The rights of minorities), U.N. Doc. HRI/GEN/1/Rev.7, 158 (May 12, 1994) (distinguishing Articles 1 and 27 of the ICCPR, although it should be noted that the HRC acknowledged in Mahuika v. New Zealand, *supra* note 70, that Article 1 helps inform article 27.)

[79] *See, e.g.*, ILA Report, *supra* note 3, at 850-57; Foster, *supra* note 11; Benedict Kingsbury, *Claims By Non-State Groups*, 25 CORNELL INT'L L.J. 481, 487 (1992); Kingsbury, *supra* note 59, at 26-31; Henriksen, *supra* note 69; Myntti, *supra* note 35, at 114-122; Stefania Errico, *The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview,* 7 HUM. RTS. L. REV. 741-55 (2007).

[80] Tennant, *supra* note 10.

[81] Federico Lenzerini, *Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples*, 42 TEX. INT'L L.J. 155, 173 (2007).

[82] Namibia, *supra* note 46, para. 63 (President Zafrulla Khan).

possible expressions of the indigenous right to self-determination.[83] Similarly, under Article 3, the free determination of political status and free pursuit of development are consequences of having the right to self-determination, rather than components of the right itself.

The key to defining self-determination is not to incorporate the specific substantive content of all other rights related to its exercise, but to distil the overarching right to its normative essence. It needs to be expressed in a form that is flexible enough to encompass and facilitate the exercise of those other rights, without diminishing their power as separate rights existing in and of themselves, and without becoming so general as to be meaningless.

The essence of self-determination in UNDRIP is the thread of empowerment running through Articles 3 and 4: the "power to have power;"[84] the freedom to choose. This focus is consistent with the emphasis on the peoples' free choice as a foundation of self-determination as it has traditionally been understood.[85]

Practically speaking, this empowerment in UNDRIP translates to an enhanced freedom to participate in decision-making. UNDRIP emphasizes the need for political participation, and the importance of indigenous peoples' freedom to choose what form their political participation will take.[86] Indigenous peoples can participate in the same systems and institutions as the rest of their state, or use their own institutions, or combine the two options. That right to choose is a vital expression of empowerment in itself. Under traditional international law, political participation as a prerequisite for self-determination is reflected in the concept of representative government upheld in General Resolution 2625 of 1970, the Friendly Relations Declaration.[87]

A significant development throughout UNDRIP, however, is the widespread use of related terms including "free, prior and informed consent," "consultation and cooperation," "partnership" and "active involvement."[88] This pattern extends participation beyond the political sphere, providing for close involvement in decision-making across all areas

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[83] Autonomy and self-government have not previously been recognized as distinct rights in international law, although elements of these concepts feature in ILO Convention 169 without express reference to self-determination. *See* Kingsbury, *supra* note 59, at 26; Myntti, *supra* note 35, at 114-22; Errico, *supra* note 79, at 749-50.

[84] Otto, *supra* note 2, at 75.

[85] Western Sahara, *supra* note 34; HIGGINS, *supra* note 35; Cassese, *supra* note 36, 334.

[86] *See* UNIDRIP arts. 5, 18 and 19.

[87] *See infra*, text accompanying note 109.

[88] *See, e.g.*, UNDRIP, preamble, para. 15, 19, 24; *Id.* arts. 5, 10-12, 15, 17-19, 22, 23, 25, 27-30, 32, 36, 38, 41.

of engagement between states and indigenous peoples. This extra dimension, described as "genuinely groundbreaking,"[89] provides the added level of empowerment that will facilitate the free pursuit of development contemplated in article 3. The significance of the enhanced participatory rights is illustrated further below, when it comes to assessing NTER against the standards of self-determination in UNDRIP.

Also integral to the interpretation of UNDRIP are the prominent themes of equality and non-discrimination woven through the text.[90] Articles 1, 2, and 9 are particularly important in this regard, emphasizing that indigenous peoples, collectively and as individuals, have the right to full enjoyment of all human rights, free from discrimination of any kind.[91] Discrimination against indigenous peoples would undermine UNDRIP altogether; the rest of the rights it contains, including self-determination and participation, can have little meaning while discrimination persists. The earlier emphasis on non-discrimination through assimilation into the dominant culture, for which ILO Convention 107 was strongly criticized,[92] has shifted to a recognition of equality that respects the value of diversity and difference and underpins the enjoyment of all other rights in UNDRIP.

Participation in decision-making and freedom from discrimination are essential prerequisites for indigenous empowerment; together, these ingredients form the content of self-determination under UNDRIP. The practical application of the right, thus defined, can be tailored to fit the specific circumstances of different indigenous peoples around the world. This interpretation is consistent with the views of various states expressed during the drafting process, including Australia.[93]

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[89] Quane, *supra* note 31, at 273.

[90] *See, e.g.,* UNDRIP preamble arts. 2, 4, 5, 9, 18, 22, arts. 1, 2, 9, 14-17, 21, 22, 24, 29, 44, 46.

[91] UNDRIP art. 1 provides:

> Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law." Art. 2 provides: "Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Art. 9 provides: "Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right."

[92] *See* XANTHAKI, *supra* note 29, 49-101; Erueti, *supra* note 29, at 93-120; Tauli-Corpuz, *supra*, note 29; Tennant, *supra* note 10; *see also* Falk, *supra* note 30, at 32-33; Barelli, *supra* note 30, at 958.

[93] *See* Economic and Social Council, Commission on Human Rights, Open-Ended Intersessional Working Group on a Draft United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/1995/WG.15/2/Add.2 para. 8 (Nov. 30, 1995) [hereinafter Working Group Draft Declaration].

*2. Scope of the Right to Self-Determination under UNDRIP*

On the whole, the rights contained in UNDRIP are generally described as means of exercising internal self-determination.[94] What is not explicitly resolved in UNDRIP is the burning question of whether it also recognizes external self-determination. Article 46(1) provides that UNDRIP does not imply a right to contravene the UN Charter, or authorize or encourage any action that would "dismember or impair . . . the territorial integrity or political unity of sovereign and independent States.[95] Certain commentators argue that the inclusion of this provision at a very late stage of negotiations implicitly ruled out any possibility of indigenous secession.[96] Several states, including Australia, seem to share this view.[97]

This argument merits close scrutiny. According to Daes, states intended that UNDRIP would only allow for internal elements of the right.[98] But reading Article 46(1) as categorically excluding the possibility of external self-determination inevitably leads to the conclusion that the right to self-determination is different in scope for indigenous peoples, as compared to all other peoples. The intention of states during drafting may be one consideration to take into account, but UNDRIP now stands as an adopted text and it is open to alternative interpretations. Let it be clear that the author expresses no opinion on the merits or otherwise of indigenous secession as such; rather, the argument to follow pursues an important point about equality–one of the cornerstones of UNDRIP. The scope of self-determination for indigenous peoples under UNDRIP must equal the scope of the right for all peoples. Closer analysis of the text itself and of the international legal context reveals why the conclusion that UNDRIP categorically excludes indigenous secession is not only unacceptable, but also unnecessary.

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[94] *See e.g.*, Eide, *supra* note 4; Daes, *supra* note 33.

[95] The full text of UNDRIP art. 46(1) reads:

> Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

[96] *See, e.g.*, Eide, *supra* note 4, at 211; Quane, *supra* note 31; Engle, *supra* note 12.

[97] Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs (FAHCSIA), Statement on the United Nations Declaration on the Rights of Indigenous Peoples (Apr. 3, 2009), *available at* http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf; Declaration Press Release, *supra* note 48.

[98] Daes, *supra* note 33; *see also* Foster, *supra* note 11, at 152-53.

There are no established rules for the interpretation of GA resolutions,[99] but by analogy, the customary rules of treaty interpretation enshrined in Articles 31-32 of the Vienna Convention on the Law of Treaties may provide useful guidance.[100] The basic rule is that a text should be interpreted in good faith according to the ordinary meaning of its terms in their context, in light of the instrument's object and purpose.[101] Recourse to supplementary means of interpretation such as the *travaux préparatoires* is generally only indicated if it is necessary to confirm the meaning resulting from the basic rule, or to determine the meaning if the application of that basic rule leads to an interpretation which is ambiguous or obscure, or manifestly absurd or unreasonable.[102]

If UNDRIP is to be applied in good faith, then it is imperative that any interpretation of UNDRIP treat the right of indigenous peoples to self-determination as equal to the right afforded to "all peoples."[103] Looking at the ordinary meaning of the language used, none of the provisions in UNDRIP expressly exclude external self-determination, in any form. Article 3 merely refers to "self-determination" in unqualified form, using identical language to common Article 1 of the ICCPR and ICESCR. Article 46(1) contains no explicit reference to self-determination nor to Article 3, but simply echoes the long-established position on self-determination under general international law.[104]

As for the context, the view that self-determination in UNDRIP is the same as that recognized for "all peoples" is supported by Article 46(2), which provides that any limitations on the rights in UNDRIP are to be non-discriminatory, and preambular paragraph 16, which affirms the fundamental importance of the right of all peoples to self-determination under the major international instruments. Further, preambular paragraph 17 states "nothing in UNDRIP may be used to deny any peoples their right to self-

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[99] *But see generally* C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 61-65 (2d ed. 2005); CARLOS FERNÁNDEZ DE CASADEVANTE ROMANI, SOVEREIGNTY AND INTERPRETATION OF INTERNATIONAL NORMS (2007).

[100] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. For a discussion of the interpretation of Security Council resolutions which likewise uses the treaty interpretation principles as a starting point, and addresses the limitations of such an approach, see Michael Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK Y.B. UNITED NATIONS L. 73 (1998).

[101] VCLT, *supra* note 100, at art. 31.

[102] VCLT, *supra* note 100, at art. 32.

[103] ILA REPORT, *supra* note 3, 850; Daes, *supra* note 50, para. 28; Lâm, *supra* note 8; Kingsbury, *supra* note 59, at 22-23; Otto, *supra* note 2.

[104] *E.g.* Colonial Declaration, *supra* note 46; Friendly Relations Declaration, *supra* note 46. The Final Act of the Conference on Security and Cooperation Europe (Aug. 1, 1975) 14 ILM 1292 [hereinafter Helsinki Final Act]; *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/24 (June 25, 1993). *See Reference re Secession of Quebec*, *supra* note 47 at para. 130.

determination exercised in conformity with international law." This is also an indication of UNDRIP's object and purpose.

Although states might argue that the object and purpose of inserting Article 46(1) was to exclude any possibility of indigenous secession as a means of self-determination, there is a counter-argument that such an interpretation violates the fundamental principle of good faith,[105] besides contradicting the ordinary meaning of the words on their face. It cannot be correct that the very instrument that recognizes indigenous peoples' right to self-determination simultaneously denies it, by removing the peoples' right to choose and restricting it to purely internal means of self-determination.[106] To read the same words as meaning something less in the case of indigenous peoples than they mean for all other peoples, without an express exclusion in the text, undermines the spirit of equality and non-discrimination that is the backbone of the text and one of the most important objects of the declaration. Rather, UNDRIP must be read as granting indigenous peoples access to the same rights and remedies available to "all peoples"–subject, of course, to the same legal limitations that apply to all peoples.

This crucial qualifier leads into the argument that a restrictive reading of UNDRIP is unnecessary. International instruments must be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation,[107] particularly *jus cogens*. The international law of self-determination outside the indigenous context has developed in such a way that it is clear the right operates subject to the overriding protection granted to the territorial integrity of "parent" states.[108] The Friendly Relations Declaration protects the territorial integrity and political unity of:

> sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government

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[105] Admittedly, UNDRIP is not a treaty and indigenous peoples are not "parties" to it in any sense, but nonetheless, the ICJ has held that the customary law principle of good faith is "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source". Nuclear Tests (Australia v. France) 1974 I.C.J. 268, para. 46 (Dec. 20) and Nuclear Tests (New Zealand v. France) 1974 I.C.J. 473, para. 49 (Dec. 20). Perhaps states are not yet under a strict obligation to recognize indigenous peoples' right to self-determination, but it seems likely that the customary status of that right will develop over time, in line with the customary obligation on states to protect "all peoples" right to self-determination.

[106] *See supra*, text accompanying note 82.

[107] Namibia, *supra* note 46, at para. 53.

[108] *See Reference re Secession of Quebec*, *supra* note 47, at para. 131; Barsh, *supra* note 26; Lars-Anders Baer, *The Right of Self-Determination and the Case of the Sami, in* Aikio & Scheinin (eds.), *supra* note 35, 223-231, 230.

> representing the whole people belonging to the territory without distinction as to race, creed or colour.[109]

There is no reason why this protection would not cover self-determination by indigenous peoples. Simply having the status of a "people" does not automatically entail a general right to unilateral secession under international law.[110] There are only limited cases where the exercise of self-determination through secession is undisputedly legitimate: where a people seek independence from colonial, foreign or alien domination.[111]

In all other cases, state boundaries are protected, provided the state possesses a representative government–that is, one whose policies "reflect the nature and interests of both the population of the state as a whole and of the peoples who are part of the population".[112] Thus, representative government requires avenues for participation in decision-making without discrimination. The wording of the Friendly Relations Declaration encapsulates the same relationship between participation and equality that was identified above as providing the foundation for self-determination under UNDRIP.

In other words, self-determination under UNDRIP derives from and is consistent with existing law on self-determination. That does not mean the right of self-determination is exactly identical in nature for all peoples in all cases–self-determination manifests in different forms, depending on the circumstances[113]–but it supports the argument that all peoples are entitled to equivalent recognition of the right.[114]

Another important consideration is that self-determination is not a static right, but a continual process.[115] If the meaningful exercise of internal self-determination becomes impossible because the state is breaching fundamental rights and is not truly representative, there is some suggestion that in exceptional circumstances a limited option of remedial secession might arise, as a last resort when all other means of peaceful remedy have

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[109] In the *Vienna Declaration* the words "as to race, creed or colour" were replaced by "of any kind."

[110] *See* Daes, *supra* note 33, at 7.

[111] *See, e.g.*, *Reference re Secession of Quebec*, *supra* note 47, at para. 131; Cassese, *supra* note 36, at 334; Colonial Declaration, *supra* note 46; Namibia, *supra* note 46; Friendly Relations Declaration, *supra* note 46.

[112] Foster, *supra* note 11, at 143; compare HIGGINS, *supra* note 35, at 124. *See also* Myntti, *supra* note 35, at 97.

[113] *See* Frederic Kirgis, Jr., *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304 (1994); Brownlie, *supra* note 1; Kingsbury, *supra* note 79, at 498.

[114] If the right for indigenous peoples is different, it must only be *more* favorable, not less, in recognition of indigenous peoples' particular disadvantage. ILA REPORT, *supra* note 3, at 850. *See also* Graham & Wiessner, *supra* note 12, at 413-14.

[115] *See* Helsinki Final Act, *supra* note 104; HIGGINS, *supra* note 35, at 115, 119; Kingsbury, *supra* note 59; Thornberry, *supra* note 45, at 51; Daes, *supra* note 42, at 79; XANTHAKI, *supra* note 29.

failed.[116] The argument for remedial secession is based on the notion that without truly representative government, the right to self-determination is frustrated in just the same manner as it is under colonial or alien domination, the traditional grounds for exercising self-determination.[117]

Looking at this argument from a different angle, Anaya advocates a conceptual shift away from the usual division between internal and external self-determination, to focus instead on substance and remedy.[118] On this view, substantive self-determination comprises those elements that are reflected in UNDRIP and generally accepted as expressions of internal self-determination.[119] Only when the government fails to make the ongoing exercise of self-determination possible within the state does the question of a remedy for the violation of the norm arise. Secession is just one example of a remedy;[120] the choice of remedy will be influenced by the context of the violation. In this regard, substantive self-determination applies broadly to benefit all segments of humanity, but remedial self-determination is necessarily narrower in application.[121]

Anaya's distinction is persuasive and illuminating. On this understanding, the entrenched assumption that self-determination means secession and is wedded to entitlements or attributes of statehood is exposed as unnecessary, confusing remedy with substance.[122] The professed fear of states is disproportionate to the actual threat to their sovereignty. No people, indigenous or otherwise, could legitimately achieve secession in a manner that would contravene international law; Article 46(1) of UNDRIP merely reiterates the established position.

Another important point, of course, is that indigenous claims are virtually never expressed as a desire for secession.[123] Simply asserting the right to self-determination does not mean sovereign independence would always be preferred.[124] The goal is almost always self-determination

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[116] *See Reference re Secession of Quebec*, *supra* note 47; Katangese People's Congress v Zaire, Afr. Comm'n. H.P.R., Comm. No. 75/92, para. 6 (1995); Loizidou v Turkey (Merits), 108 Eur. Ct. H.R. 443, 471 (per Judge Wildhaber, joined by Judge Ryssdal) (1996). *See also* XANTHAKI, *supra* note 29, at 142-43.

[117] *Reference re Secession of Quebec*, *supra* note 47, at 135; *see also* Lenzerini, *supra* note 81, at 174; XANTHAKI, *supra* note 29, at 136.

[118] Anaya (1993), *supra* note 35; Anaya (2000), *supra* note 35.

[119] Anaya divides the substance into constitutive and ongoing self-determination; this article is only concerned with ongoing self-determination. *See* Anaya *supra* note 35, (1993) at 145; Anaya (2000) at 9-12.

[120] Other options are established in, for example, G.A. Res. 1541 (1960) and the Friendly Relations Declaration, *supra* note 46.

[121] ANAYA (2000), *supra* note 35, at 13.

[122] *See* Kingsbury, *supra* note 79, at 502; ANAYA (2000), *supra* note 35, at 12; XANTHAKI, *supra* note 29, at 152; Cassese, *supra* note 36, at 348-51.

[123] *See* Daes, *supra* note 33; Thornberry, *supra* note 45, at 53; Quane, *supra* note 31, at 266; Eide, *supra* note 4, at 172.

[124] Otto, *supra* note 2, at 72; Kingsbury, *supra* note 79, at 498; HIGGINS, *supra* note 35, at 25.

alongside the other peoples sharing the same state: interdependence rather than independence.[125]

Nonetheless, indigenous peoples are justified in insisting that the right to self-determination in UNDRIP should not be read down as a lesser form of the right accorded to all other peoples. The better interpretation is that indigenous self-determination is consistent with established international norms and equivalent to "traditional" self-determination in scope. It is capable of encapsulating indigenous peoples' own expressions of self-determination and recognizing their fundamental right to equality, without any increased threat to the principles of state sovereignty and territorial integrity. The common but misguided assumption that the term "self-determination" is interchangeable with the term "secession" should not be allowed to stand in the way of development of indigenous self-determination in parallel with the right to self-determination of all peoples. States that are genuinely willing to engage with indigenous peoples in the spirit of UNDRIP have nothing to fear from its recognition of self-determination.

### *C. Self-determination as Empowerment, through Freedom from Discrimination and Participation in Decision-Making*

Based on the preceding consideration of the background of self-determination under international law, and analysis of the content and scope of the right as expressed in UNDRIP, it is possible to articulate a definition of the right as it should apply in the indigenous context. The vexed question of whether indigenous peoples are "peoples" has been resolved by Article 3 of UNDRIP, which provides indigenous peoples with the same unqualified right to self-determination recognized for "all peoples" under international law. Although UNDRIP itself is not a source of binding legal obligations,[126] some commentators assert that the right to self-determination of indigenous

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[125] Tennant, *supra* note 10; Corntassel & Hopkins, *supra* note 30; Murphy, *supra* note 2; Kingsbury, *supra* note 59, at 24; W. Sanders, "Towards an Indigenous Order of Australian Government: Rethinking Self-determination as Indigenous Affairs Policy," Discussion Paper 230 (Centre for Aboriginal Economic Policy Research, Australian National University, 2002).

[126] The provisions of G.A. resolutions amount to recommendations, rather than obligations. *See* U.N. Charter arts. 10-14. States used this proposition to argue both for increasing and reducing protections while drafting UNDRIP. *See* Barsh, *supra* note 26, 789. As a declaration, UNDRIP will carry higher expectations toward compliance than an ordinary resolution. ILA REPORT, *supra* note 3, at 840-41; Anaya REPORT 2008, *supra* note 30; Barelli, *supra* note 30. However, many states have made a point of observing that it is an aspirational document, not a legal one, and compliance with its standards is not obligatory. *See, e.g.*, General Assembly meeting record, U.N. Doc. A/61/PV.107 (Sept. 13, 2007); Declaration Press Release, *supra* note 48. For more nuanced discussion on the status of G.A. resolutions, see Namibia, *supra* note 46, at para. 50; HIGGINS, *supra* note 35, at 22-28; FERNÁNDEZ DE CASADEVANTE ROMANI, *supra* note 99, at 65 et seq.

peoples enjoys customary status,[127] equivalent to the settled status of the general right of peoples to self-determination as a right *erga omnes* under customary international law.[128] Unfortunately, however, this assertion is not (yet) supported by the requisite elements of *opinio juris*[129] and state practice.[130] The better view is that it is premature to assert that the right to self-determination of indigenous peoples has crystallized as a customary norm at this point in time.[131] Nonetheless, UNDRIP's adoption represents a significant step forward at the international level, and it will increase in status and relevance over time.

Analysis of the text reveals that the right to self-determination in UNDRIP amounts to the empowerment of a people to control its own affairs, founded on two essential rights: the right to be free from discrimination, and the right to meaningful participation in decision-making. This analysis is important for three reasons. First, interpreting indigenous self-determination as founded on these two basic rights strips it of some of its controversy, by shifting the focus towards implementation of those rights as necessary prerequisites for substantive self-determination, instead of unnecessarily contentious issues around external self-determination. In other words, self-determination does not just mean secession.

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[127] *See, e.g.*, ILA REPORT, *supra* note 3, at 909-10; Eide, *supra* note 4, at 157; Wiessner, *supra* notes 4 and 5; Lenzerini, *supra* note 81, at 187; Anaya & Wiessner, *supra* note 33.

[128] East Timor (Portugal v. Australia), 1995 I.C.J. 90, para. 29 (1995); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, para. 88 (2004).

[129] The process for including self-determination in UNDRIP was so fraught and controversial that it is doubtful the level of *opinio juris* meets the requisite standard: four states with significant indigenous populations voted against the adoption of UNDRIP, and many states who supported it expressly stated that they did not believe themselves to be bound by its provisions. *See* General Assembly meeting record, *supra* note 126; Declaration Press Release, *supra* note 48. Compare Lenzerini, *supra* note 81 and Anaya & Wiessner, *supra* note 33, who argue that this does not undermine *opinio juris*.

[130] The reality of life for indigenous peoples worldwide is generally far removed from any notion of self-determination on a factual level. *See* MARTÍNEZ-COBO REPORT 1983, *supra* note 38; Cassidy, *supra* note 2; ANAYA REPORT 2008, *supra* note 30. Numerous indigenous complaints brought before the HRC and regional human rights systems confirm that there are widespread problems with state practice regarding key indigenous issues, including control of traditional lands and natural resources, equality of rights, and political participation. *See, e.g.*, Endorois v. Kenya, African Comm'n H.P.R, Com. No. 276/2003 (2009); Maya (Toledo) v. Belize, *supra* note 44; Dann v. United States, *supra* note 44; Lubicon Lake Band v. Canada, *supra* note 38; Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. C/172 (Nov. 28, 2007); Awas Tingni v. Nicaragua, Inter-Am. Ct. H.R., No. C/79 (Aug. 31, 2001); Yakye Axa v. Paraguay, Inter-Am. Ct. H.R., No. C/125 (June 17, 2005); YATAMA v. Nicaragua, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127, para. 214-220 (June 23, 2005); Moiwana v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 124 (Feb. 8, 2006); Sawhoyamaxa v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006).

[131] XANTHAKI, *supra* note 29; Quane, *supra* note 31, at 261. This conclusion does not preclude the right from acquiring that status in time, of course; on the contrary, it will be necessary for that to happen if the indigenous right to self-determination is to become truly equal to the right of "all peoples", as this article argues it must.

Second, by recognizing that the fundamental relationship between participation, non-discrimination and self-determination under UNDRIP is consistent with established law deriving from the UN Charter and the Friendly Relations Declaration, it implies that indigenous and "traditional" self-determination need not and should not be perceived as different rights.[132] The argument is not that self-determination for indigenous peoples is exactly identical in nature to self-determination for other peoples, but that they share common foundations and must be treated as equal in scope. This opens the door for further unified development of the right to self-determination for all peoples.[133]

Finally, the analysis highlights the crucial shift towards empowerment that UNDRIP represents, which was previously lacking for indigenous peoples under the international human rights framework. As such, UNDRIP provides an important benchmark of the standards required to ensure indigenous peoples achieve full enjoyment of their rights.

Nonetheless, if UNDRIP is not implemented by states, its potential will be frustrated, as illustrated in Australia. Australia was influential in the development of the draft,[134] but ultimately voted against UNDRIP's adoption in the GA, citing dissatisfaction with the inclusion of self-determination as an important factor in its negative vote.[135] On April 3, 2009, however, Australia announced its support for UNDRIP.[136] UN experts hailed this as a crucial step in increasing the international consensus on indigenous rights,[137] but the careful language of Australia's official endorsement cautions against any hasty conclusion that Australia's fundamental position on the core issues of contention had changed.[138]

On the whole, it would be unrealistic to argue that Australia is currently under a clear legal obligation to ensure indigenous self-determination in accordance with UNDRIP. As soft law, UNDRIP is not binding, and it cannot yet be said that indigenous self-determination is a

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[132] Compare Quane, *supra* note 31, at 267 (identifying the common foundations, but seeing UNDRIP as a departure from existing law).

[133] This approach is supported by ANAYA (2000), *supra* note 35, at 6-12; Henriksen, *supra* note 69, at 141.

[134] Daes, *supra* note 26, at 798; Daes, *supra* note 33, at 16.

[135] General Assembly meeting record, *supra* note 126, at 11.

[136] Macklin, *supra* note 97.

[137] Statement by Special Rapporteur James Anaya, United Nations Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) Chairperson John Henriksen and UNPFII Chairperson Victoria Tauli-Corpuz, UN Experts Welcome Australia's Endorsement of the United Nations Declaration on the Rights of Indigenous Peoples (April 3, 2009), *available at* http://www.un.org/esa/socdev/unpfii/documents/Australia_endorsement_UNDRIP.pdf.

[138] Macklin, *supra* note 97. The single mention of self-determination avoids using the word "right" and repeats that UNDRIP cannot be used to undermine territorial integrity.

customary norm of international law; nor has it been incorporated into Australia's domestic law. However, Australia is actually under binding international obligations in respect of the foundations of self-determination: non-discrimination and participation;[139] on this basis it arguably does have an indirect obligation to uphold indigenous self-determination. Moreover, Australia has recognized that it will be measured against UNDRIP's standards, and has itself referred to some of UNDRIP's provisions when defending NTER.[140] Indigenous self-determination has been a prominent issue in Australia in the past,[141] and its relevance will gather new momentum as UNDRIP's influence develops under international law. Already there is considerable pressure within Australia for attitudes towards indigenous self-determination to develop in line with international standards, and for the federal, state and territory governments to show they are truly dedicated to implementing the goals of UNDRIP.[142]

Having articulated the ingredients of indigenous self-determination at the international level, the remainder of this article considers the international legal foundations of self-determination at the domestic level. The next section discusses the Intervention, as a topical example in which the fundamental prerequisites for indigenous self-determination have been lacking. Australia has vacillated between support and opposition for UNDRIP, but the measures it took in 2007 to address indigenous disadvantage were wholly inconsistent with any notion of empowerment, and thus with the developing norm of self-determination in international law.

Looking back at the lessons of the Intervention is important preparation for the next stage in Australia's battle to move beyond current levels of entrenched indigenous disadvantage. It is also relevant beyond its domestic context because it illustrates that existing protections of the fundamental rights underpinning self-determination have been inadequate to guarantee full enjoyment of the rights of indigenous peoples on an equal

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[139] *See infra*, sections III(B) and III(C).

[140] ANAYA REPORT 2010, *supra* note 38, para. 48, 54.

[141] *See* Sanders, *supra* note 125; Peter Billings, *Still Paying the Price for Benign Intentions? Contextualising Contemporary Interventions in the Lives of Aboriginal Peoples*, 33 MELBOURNE U. L. REV. 1 (2009); Geoffrey Partington, *Hasluck versus Coombs: White Politics and Australia's Aboriginals*, electronic pdf version (2005), *available at* www.bennelong.com.au/books/pdf/PartingtonWeb.pdf.

[142] *See, e.g.*, the work of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *available at* http://www.hreoc.gov.au/social_justice/index.html; the widely-endorsed statement entitled "Rebuilding from the Ground Up: Alternative to the Intervention" initiated by STICS and the Intervention Rollback Action Group (demanding that all indigenous policy comply with UNDRIP), *available at* http://stoptheintervention.org/alternatives-to-the-intervention (last visited Oct. 16, 2011); numerous submissions to the Senate inquiry in connection with the Stronger Futures package are available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/strong_future_nt_11/submissions.htm.

level with other peoples, and serves as a warning of the consequences that arise when a state attempts to improve the situation of indigenous peoples without adhering to evolving standards of international law.

## III. INDIGENOUS SELF-DETERMINATION AND NTER

> *The Intervention is a victory for anybody obtuse enough to believe that human misery can be alleviated while ignoring human dignity.*[143]

This section starts by introducing the background and key features of the Intervention. It then applies the interpretation of self-determination advocated above to NTER, by examining in more depth the two major rights underpinning indigenous self-determination in international law, and assessing the extent to which NTER demonstrates a failure on Australia's part to comply with these norms.

### *A. The Intervention*

#### *1. Ampe Akelyernemane Meke Mekarle: Little Children Are Sacred*

On August 8, 2006, following growing concern about the issue of child abuse in Aboriginal communities,[144] the NT government appointed a Board of Inquiry ("the Board") to investigate the prevalence of sexual abuse of Aboriginal children in NT communities, particularly unreported abuse, and to consider how to improve governmental and non-governmental practices and procedures to "effectively prevent and tackle child abuse."[145] After extensive research, including wide consultations with Aboriginal peoples and service providers, the Board provided its report, Little Children Are Sacred, to the NT government on April 30, 2007. The report was released publicly on June 15, 2007.

Little Children Are Sacred confirmed that child abuse was a serious problem in Aboriginal communities in NT and that it often went unreported.[146] Harrowing stories documented by the Board exposed a disturbing range of patterns and cycles of abuse and sexualization of children, with frequent violations of both "mainstream" law and long established Aboriginal laws, often perpetrated by children or young people

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[143] Nicole Watson, *Of Course It Wouldn't Be Done in Dickson! Why Howard's Battlers Disengaged From the Northern Territory Emergency Response,* 8 Borderlands e-journal 1, 17 (2009).

[144] *See* Marcia Langton, *Trapped in the Aboriginal Reality Show*, 19 GRIFFITH REVIEW (2007).

[145] LITTLE CHILDREN ARE SACRED, *supra* note 14, at 4. The two Board members and co-chairs, Rex Wild QC and Patricia Anderson, were appointed under the *Northern Territory Inquiries Act 2006* (Aust.).

[146] LITTLE CHILDREN ARE SACRED, *supra* note 14, at 16.

themselves, both male and female.[147] Such reports give rise to extreme concern about Australia's compliance with international obligations to protect the rights of children.[148] The Board recommended that Aboriginal child sexual abuse in the Northern Territory be designated as an issue of urgent national significance.

The Board warned against a crisis-driven, band-aid response, however, and took pains to dispel various myths perpetuated in the mainstream media about the nature of and reasons behind Aboriginal child abuse.[149] The Board pointed out that similar and significant problems of child abuse and neglect exist in all sectors of society, nationally and internationally, and that in NT as elsewhere it is a direct symptom of other areas of social breakdown caused by "the usual suspects"–for example poverty, a lack of education, poor health, alcohol and drug abuse, unemployment, overcrowded housing, and general disempowerment.[150] The Board emphasized that many reports presented over the years had illustrated the same problems and suggested the same solutions for tackling these wider issues[151]–that the recommendations in Little Children Are Sacred were nothing new, but decisive action was long overdue.[152] Noting that realistically it might take a generation for the real benefits of change to be felt, they stressed it was imperative the first steps be taken immediately as a matter of extreme urgency to avert a looming disaster.[153] It required:

> [A] concerted, determined effort to break the cycle and provide the necessary strength, power and appropriate support to local services and communities, so they can lead themselves out of the malaise: in a word, *empowerment*![154]

These central messages of the need for genuine empowerment and the urgency of the situation were repeated in compelling language throughout the Board's descriptions of its consultations with Aboriginal people and its 97 specific recommendations for action.

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[147] LITTLE CHILDREN ARE SACRED, *supra* note 14, at 59-73.

[148] *See* especially the U.N. Convention on the Rights of the Child art. 19, Month, Day, 1989, 1577 U.N.T.S. 3. Australia ratified the Convention in 1990.

[149] *See, e.g.*, LITTLE CHILDREN ARE SACRED, *supra* note 14, at 12, 57-59.

[150] LITTLE CHILDREN ARE SACRED, *supra* note 14. For a description of living conditions in remote Aboriginal communities, see Steven Etherington, *The Most Threatened People in Australia: The Remote Aboriginal Minority, in* Johns (ed.), *supra* note 57, at 59-77; Langton, *supra* note 144.

[151] LITTLE CHILDREN ARE SACRED, *supra* note 14, at 13.

[152] *See also* Howard-Wagner, *supra* note 2; Langton, *supra* note 144.

[153] LITTLE CHILDREN ARE SACRED, *supra* note 14, at 6.

[154] LITTLE CHILDREN ARE SACRED, *supra* note 14, at 13 (emphasis in original).

### *2. Key Features of the Intervention*

Australia's response to *Little Children Are Sacred* picked up on the message of urgency, but it did so at the expense of the opportunity to build empowerment. On June 15, 2007, the day the report was publicly released, the federal government issued a press release declaring it was committed to doing "whatever it takes to bring an end to this insidious behaviour in Indigenous communities."[155] Six days later, Australia announced it would be launching an emergency intervention into Aboriginal communities in NT.[156] State and federal troops were deployed in NT shortly thereafter.[157]

Within just seven weeks, a comprehensive and complex suite of legislation had been approved by federal Parliament.[158] Prime Minister John Howard said the federal government was taking over with a "sweeping assumption of power."[159] The government said action was necessary to "stabilise" communities before the "normalisation" and "exit" phases could begin.[160] Aboriginal communities were described as a "failed society."[161]

Reforms included significant changes to the welfare system, including compulsory income management and linking welfare payments to children's school attendance; restrictions on sales and use of alcohol and pornography

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[155] Mal Brough, CGA Press Release, NT Child Abuse Inquiry (June 15, 2007), *available at* http://www.formerministers.fahcsia.gov.au/3517/ntcai_15jun07/, (last visitedFeb. 4, 2013).

[156] Mal Brough & John Howard, CGA Media Release, National Emergency Response to Protect Aboriginal Children in the NT (June 21, 2007), *available at* http://www.formerministers.fahcsia.gov.au/3581/emergency_21june07/, (last visited Feb. 4, 2013). [hereinafter Brough & Howard Press Release].

[157] Australian Broadcasting Corporation (ABC), *Insiders*, Interview with Mal Brough MP (June 24, 2007) *available at* http://www.abc.net.au/insiders/content/2007/s1960087.htm, last visited Apr. 2, 2011) [hereinafter "Brough *Insiders* Interview"].

[158] *See* Jonathon Hunyor, *Is It Time to Re-Think Special Measures Under the Racial Discrimination Act?: The Case of the Northern Territory Intervention,* 14 AUS. J. OF HUM. RTS. 39, 59 (2009). The initial Intervention legislation package comprised five statutes: *Northern Territory National Emergency Response Act 2007* (Cth) (Austl.) [hereinafter NTERA]; *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) (Austl.) [hereinafter "WPRA"]; Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth) and two appropriation Acts.

[159] John Howard PM, Address to the Sydney Institute (June 25, 2007) *available at* http://www.antar.org.au/node/86, (last visited 2 Apr. 2011) [hereinafter "Howard Sydney Institute Address"]. For discussion of concerns about the excessive and *ultra vires* exercise of federal executive power within NT, see *Wurridjal v Australia* [2009] HCA 2, per Kirby J (dissent), para. 226-234 (Austl.) and Greg McIntyre, *An Imbalance of Constitutional Power and Human Rights: The 2007 Federal Intervention in the Northern Territory*, 14 JAMES COOK U. L. REV. 81, 94-100 (2007).

[160] *See* CGA, Official Committee Hansard, Senate Standing Committee on Legal and Constitutional Affairs, Reference: Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and Four Related Bills Concerning the Northern Territory National Emergency Response (Aug. 10, 2007), *available at* http://www.aph.gov.au/hansard/senate/commttee/S10473.pdf [hereinafter Committee Hansard 2007]; Howard, *supra* note 159.

[161] CGA, House of Representatives, Official Hansard, Northern Territory National Emergency Response Bill 2007: second reading speech by Mal Brough MP (Aug. 7, 2007), *available at* http://www.aph.gov.au/hansard/reps/dailys/ dr070807.pdf [hereinafter Second Reading NTER].

in prescribed areas; the acquisition and control of Aboriginal townships through compulsory five-year leases to the government; an increased police presence in NT communities; the appointment of external managers of all government business in communities; and the removal of customary law as mitigation in sentencing and bail decisions.[162]

NTER represented a "remarkable governmental intrusion by the Commonwealth into the daily lives of Australian citizens in the Northern Territory, identified mostly by reference to their race."[163] In the words of the Aboriginal and Torres Strait Islander Social Justice Commissioner, "the extent to which the Intervention would shift the social, cultural and legal landscapes of Aboriginal communities in NT was immediately obvious."[164] The full scope of Intervention measures is too wide to cover in detail here, particularly as the focus of the critique is on the overarching approach, not the substance of the numerous different policies introduced under NTER umbrella. Where specific examples are required to support the arguments in this article, the author has chosen to focus mainly on the compulsory income management regime, in an attempt to engage with issues central to one of the most controversial reforms introduced by NTER. NTER Review Board in 2008 observed that income management "has become synonymous with NTER and is the most widely recognized measure."[165] The regime continues to have significant ongoing relevance not only because it affects a large number of people on a day-to-day level, but because legislative amendments have broadened and extended income management.

Compulsory income management for welfare recipients was one of the major reforms of the Intervention, and one in which the procedural and substantive failings of Australia's approach were particularly glaring.[166] Under the regime, 50% of individuals' income support and 100% of

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[162] *See* McIntyre, *supra* note 159, at 84-91; Billings*, supra* note 141; COERCIVE RECONCILIATION: STABILISE, NORMALISE, EXIT ABORIGINAL AUSTRALIA (Jon Altman & Melinda Hinkson eds., 2007) [hereinafter COERCIVE RECONCILIATION].

[163] Wurridjal v. Australia para. 243 (Kirby J. dissenting).

[164] HREOC, REPORT OF THE ABORIGINAL AND TORRES STRAIT ISLANDER SOCIAL JUSTICE COMMISSIONER, *Social Justice Report 2007* (Report Jan. 2008), *available at* http://www.hreoc.gov.au/social_justice/sj_report/sjreport 07/pdf/sjr_2007.pdf [hereinafter HREOC SOCIAL JUSTICE REPORT 2007].

[165] REVIEW BOARD REPORT*, supra* note 24, at 20.

[166] This article only considers the regime under the *Social Security Administration Act 1991* (Cth) [hereinafter SSAA], s 123UB (inserted by WPRA, Schedule 1, s 17 but repealed by WRRRDA, s 12), triggered by a beneficiary's physical presence in a relevant Northern Territory area (as distinct from the regime under SSAA, ss 123UC-123UF). Regimes set up in other parts of Australia have operated differently; the Northern Territory version is the "most punitive and oppressive." *See* J. Sutton, *Emergency Welfare Reforms: A Mirror to the Past?*, 33 ALT. L.J. 27 (2008). *See also* Thalia Anthony, *The Return to the Legal and Citizenship Void: Indigenous Welfare Quarantining in the Northern Territory and Cape York,* 10 BALAYI: CULTURE L. AND COLONIALISM 29 (2009); Peter Billings*, Social Welfare Experiments in Australia: More Trials for Aboriginal Families?*, 17 J. SOCIAL SECURITY L. 164 (2010).

advances and lump sum payments made to them are diverted to an income management account controlled by the national welfare agency.[167] After deduction of expenses like rent and fines, the quarantined portion can only be spent in specially licensed stores using a "BasicsCard" that clearly identifies the holder as subject to income management; this money is not accessible as cash.[168] The quarantined portion is to be used for "priority needs" such as food and clothing,[169] and cannot be spent on excluded goods and services, including alcohol, pornography, gambling and tobacco.[170]

Compulsory income management constitutes a significant interference with the daily lives and choices of those affected, at a very personal level. This is not to say that some participants might not find it beneficial, and a case could certainly be made for implementing voluntary income management systems, as a matter of policy.[171] But the crucial point to be highlighted here is that the original reforms were imposed on all welfare recipients in the prescribed areas with no room for differentiation on the basis of individual circumstances. It seems Australia believed blanket restrictions on individuals were justified by supposed benefits for the wider community: the primary purpose was to "manage income flow to each community as a whole" in order to "encourage expenditure on those goods and services that will lead to better outcomes for the children in those communities."[172] The Prime Minister described the overriding objective of income quarantining as being "to reduce the amount of money finding its way towards alcohol and drugs in indigenous communities during the emergency period." Part of the motivation was to provide "a clear signal to the communities."[173]

NTER also removed the right of appeal to the Social Security Appeals Tribunal and Administrative Appeals Tribunal, leaving no feasible option for

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[167] *See* Social Security Administration Act ("SSAA"), ss 123XA-123XH (repealed).

[168] SSAA, s 123YE, as amended by WPRA, Schedule 1, s 17.

[169] SSAA, s 123TH.

[170] SSAA, s 123TI.

[171] Both the REVIEW BOARD REPORT in 2008, *supra* note 24 at 20-21, and the CGA, NORTHERN TERRITORY EMERGENCY RESPONSE EVALUATION REPORT 2011 [hereinafter 2011 NTER EVALUATION REPORT], are *available at* http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/nter_evaluation_report_2011.pdf (providing anecdotal evidence that a number of community members subject to income management, particularly women, found it useful in avoiding "humbugging" from family members for cash and in ensuring that sufficient funds were budgeted for meeting family needs.).

[172] CGA, SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, REPORT, SOCIAL SECURITY AND OTHER LEGISLATION AMENDMENT (WELFARE PAYMENT REFORM) BILL 2007 AND FOUR RELATED BILLS CONCERNING THE NORTHERN TERRITORY NATIONAL EMERGENCY RESPONSE para. 2.63 (AUGUST 2007), *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/nt_emergency/report/report.pdf [hereinafter SENATE COMMITTEE REPORT 2007].

[173] Howard, *supra* note 159.

external review to challenge income quarantining in any particular case.[174] The explanation for this extraordinary departure from due process was that appeals would "take too long and interfere with the Intervention timeframe;" it was implied that the abrogation of appeal rights was unimportant anyway because "people would only have their income managed for 12 months, and it would only be half of it."[175]

*3. Criticism of the Intervention*

The initial Intervention methodology has been extensively criticized,[176] including by the Northern Territory Government,[177] the authors of Little Children Are Sacred,[178] and Aboriginal representatives: for example, Galarrwuy Yunupingu, an Aboriginal leader who initially supported the Intervention, withdrew his support and in August 2009 described it as a form of apartheid,[179] and a group of Aboriginal people from various NT communities submitted a request for urgent action to the UN Committee on the Elimination of Racial Discrimination ("CERD"),[180] while others lodged claims for refugee status in protest.[181] As noted above, there is no denying that action was urgently required.[182] The major success of the Intervention is that it focused national attention on the problems afflicting NT communities and stimulated a large injection of much-needed funding for increased service provision and infrastructure within those communities. However, the anecdotal evidence, along with what little reliable empirical

[174] SSAA, s 144(ka), inserted by WPRA, Schedule 1, s 18 (now repealed); National Welfare Rights Network, Submission No. 44 to Senate Legal and Constitutional Affairs Committee (2007), *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/nt_emergency/submissions/sub44.pdf; Billings, *supra* note 141.

[175] Senate Committee Report 2007, *supra* note 172, para. 2.64. A right of appeal through the Social Security Appeals Tribunal was provided in 2009.

[176] Individual critics are too numerous to list here; for a summary of major problems, see Altman & Hinkson (eds.), *supra* note 162; ANAYA REPORT 2010, *supra* note 38, ay Appendix B; Request for Urgent Action under ICERD in relation to the Commonwealth Government of Australia (Jan. 28, 2009, updated Aug. 11, 2009) submitted by a group of Aboriginal Australians affected by NTER, through legal representatives, *available at* http://www.hrlrc.org.au/files/E75QFXXYE7/Request_for_Urgent_Action_Cerd.pdf and http://www.hrlrc.org.au/files/Update-to-CERD-11-August-2009.pdf [hereinafter "ICERD Request"].

[177] Northern Territory Government, Submission No. 127 to Senate Legal and Constitutional Affairs Committee, *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-7/nt_emergency/submissions/sub127.pdf.

[178] *Lateline: Business*, interview with Rex Wild QC, ABC, June 27, 2007, *available at* http://www.abc.net.au/lateline/content/2007/s1964086.htm, (last visited Apr. 2, 2011); Rex Wild QC, *Unforeseen Circumstances*, in Altman & Hinkson (eds.), *supra* note 162, at 111-20.

[179] Ben Schokman, *Opinion: Sorry About the Intervention*, 35 ALT. L.J. 2, 2 (2010).

[180] ICERD Request, *supra* note 176.

[181] Phoebe Stewart, *Aboriginal People Seek Refugee Status*, ABC NEWS, Aug. 26, 2009, *available at* http://www.abc.net.au/news/stories/2009/08/26/2667066.htm?site=news, (last visited Apr. 6, 2011).

[182] *See* Langton, *supra* note 144; LITTLE CHILDREN ARE SACRED, *supra* note 14.

evidence there is, suggests that the approach taken by the Australian government when it launched the Intervention may have contributed more to some of the underlying problems than to their solutions–even where individual measures might themselves have otherwise been welcomed.[183] Although all action at the national level was purportedly designed to protect children from harm in response to Little Children Are Sacred,[184] the Intervention did not implement the report's 97 specific recommendations.[185]

State representatives claimed to have closely considered Australia's international obligations when drafting the Intervention legislation.[186] However, NTER (including the income management regime in particular) was widely condemned as inconsistent with Australia's international human rights obligations.[187] The criticism was characterized by two major recurring themes: first, that the Intervention was racially discriminatory, and second, that people living in target communities were not given a chance to be involved in designing or implementing the measures that were ostensibly intended to protect their rights, and those of their children.[188] Subsequent efforts in 2009 and 2010 to amend NTER and increase participation were a step in the right direction, but they did not adequately remedy these deficiencies.[189]

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[183] *See, e.g.,* Larissa Behrendt, *Back to the Future for Indigenous Australia*, *in* ALL THAT'S LEFT: WHAT LABOR SHOULD STAND FOR 113-34 (Nick Dyrenfurth & Tim Soutphomasane eds., 2010); Nicholas Rothwell, *Destroyed in Alice*, THE AUSTRALIAN, Feb. 19, 2011; AUSTRALIAN GOVERNMENT: DEPT. OF FAMILIES, HOUSING, COMMUNITY SERVICES, AND INDIGENOUS AFFAIRS, CLOSING THE GAP: ENGAGEMENT AND PARTNERSHIP WITH INDIGENOUS PEOPLE, *available at* http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/closing-the-gap/closing-the-gap-engagement-and-partnership-with-indigenous-people, (last visited July 8, 2012) [hereinafter CLOSING THE GAP]; HREOC SOCIAL JUSTICE REPORT 2007, *supra* note 164; REVIEW BOARD REPORT, *supra* note 24; ICERD Request, *supra* note 176; Billings, *supra* note 141; CULTURAL AND INDIGENOUS RESEARCH CENTRE AUSTRALIA, REPORT ON NTER REDESIGN ENGAGEMENT STRATEGY AND IMPLEMENTATION (2009), *available at* http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_engagement_strategy/final_report_09_engage_strat.pdf, [hereinafter CIRCA REPORT 2009]; NTER EVALUATION REPORT 2011, *supra* note 171; CGA, Senate, Proof Hansard, *Social Security Legislation Amendment Bill 2011,* Stronger Futures in the Northern Territory Bill 2012, Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011–Second (June 28, 2012), *available at* http://www.aph.gov.au/Parliamentary_Business/Hansard/Hanssen261110 [hereinafter Stronger Futures Senate Hansard 2012].

[184] *See* Brough & Howard Media Release, *supra* note 156.

[185] ICERD Request, *supra* note 176, para. 6.

[186] Committee Hansard 2007, *supra* note 160, at 11.

[187] *See* ANAYA REPORT 2008, *supra* note 30; ANAYA REPORT 2010, *supra* note 38, at Appendix B.

[188] These themes are evident throughout the criticism, and reflected in NTER Review Board's recommendations. *See* REVIEW BOARD REPORT, *supra* note 183. *See also* ANAYA REPORT 2010, *supra* note 38.

[189] *See* Vivian, *supra* note 19; Amnesty International, Submission No. 19 *supra* note 19; HREOC REPORT ON RDA AND SPECIAL MEASURES, *supra* note 19; *see also infra* III(B)(2) and III(C)(2).

These two themes of criticism form the parameters of discussion in the next two sections. With any high-profile policy initiative there will always be those who think it is inadequate and those who argue it went too far. Many critics of the critics viewed the outcry over the human rights violations of the Intervention methods as masking the true need for a response on behalf of children and other vulnerable people living in struggling communities; some argued consultations and negotiations were a waste of time, and said the communities needed tough love.[190] A detailed consideration of the political arguments advanced in support of various positions on both sides of the fence is beyond the scope of this article, which is limited to an assessment of Australia's methodology against the criteria of participation and non-discrimination that the author has identified as fundamental to fostering self-determination under international law.

From this perspective, the paternalistic approach taken in NTER is strikingly at odds with the standards in UNDRIP, which are minimum standards of achievement to be pursued in a spirit of partnership and mutual respect.[191] This claim is not to privilege matters of process and procedure over the substance of the problems that NTER purported to target; it comes from a recognition that no matter how laudable the motives, lasting change cannot be effected if the steps taken to address the crisis themselves violate the rights of the intended beneficiaries. The methodology of NTER lacked both essential foundations for self-determination: the rights to freedom from discrimination and participation in decision-making. The next two sections develop this argument by examining each of those foundations in more detail under international law, and analyzing their application in NT.

### *B. The Right to be Free from Racial Discrimination*

#### *1. International Law*

International law provides a clear and well-established universal right to be free from discrimination. Besides its inclusion in numerous international and regional instruments,[192] non-discrimination is arguably a non-derogable *jus cogens* norm and a right *erga omnes* under customary international law.[193] The principle of non-discrimination "permeates the

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[190] *See, e.g.*, Langton, *supra* note 144; PETER SUTTON, THE POLITICS OF SUFFERING: INDIGENOUS AUSTRALIA AND THE END OF THE LIBERAL CONSENSUS (2009).

[191] UNDRIP, preambular para. 24; art. 43. (

[192] *See, e.g.*, U.N. Charter, arts. 1(3), 13(1)(b), 55(c), 56, 76(c); UDHR, arts. 1, 2, 7; ICCPR, arts. 2, 26; ICESCR arts. 2(2), 3; ICERD, art. 2; ILO Convention 169, art. 6.

[193] *See, e.g.*, South West Africa Cases (Second Phase), 1966 I.C.J. 293, para. 6 (1966) (per Judge Tanaka dissenting); Barcelona Traction, Judgment, 1970 I.C.J. 3, para. 32 (1970); Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18,

guarantee of all other rights and freedoms under domestic and international law."[194] UNDRIP emphasizes that indigenous peoples are equal to all others, and that they have the right, collectively and individually, to freedom from any kind of discrimination.[195]

The pertinent elements of the definition of racial discrimination in Article 1.1 of the International Convention on the Elimination of All Forms of Racial Discrimination (1969) ("CERD") can be summarized, for present purposes, as any distinction that is based on race, and has the purpose or effect of impairing equal enjoyment of rights in any field of public life.

Historically, attempts to address discrimination against indigenous peoples have commonly taken either an integrationist/assimilationist approach, or a paternalist/protectionist approach, which are themselves discriminatory.[196] The first of these treats equality as "sameness:" the idea has been to assimilate indigenous peoples into the dominant culture so that differences are eventually eroded.[197] The second approach, paternalism, is particularly prevalent in colonialist state-indigenous relationships: states claim to be protecting indigenous peoples by deciding what is good for them. Tennant describes it as the "primitivisation" of indigenous peoples.[198]

International attitudes have largely shifted away from these approaches.[199] UNDRIP reflects this evolution, placing a high value on diversity and respect for cultural differences, and emphasizing the need to foster partnerships with indigenous peoples as an element of their right to self-determination, instead of imposing assistance in a top-down manner.[200]

### *2. Discrimination in NTER*

Unfortunately, the Intervention flew in the face of these developments. Special Rapporteur Anaya considered the original Intervention measures to be aggressive and extraordinary, with deep implications for a range of fundamental rights, but especially for the right to

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para. 173(4) (Sept. 17, 2003). *See also* ICCPR, art. 4(1); Anaya Report 2010, supra note 38, at Appendix B, para. 18, 60; INTERNATIONAL HUMAN RIGHTS IN CONTEXT 78 (HENRY STEINER, PHILIP ALSTON & RYAN GOODMAN, EDS., 3d ed. 2008).

[194] Maya (Toledo) v. Belize, *supra* note 44, at para. 163. *See also* HRC, General Comment No 23, *supra* note 78; Rights of the Undocumented Migrants, *supra* note 193, at para. 101; Legal Resources Foundation v. Zambia, African Comm'n on Human and People's Rights, Communication No. 211/98, para. 63 (2001).

[195] *See*UNDRIP preamble, arts. 2, 4, 5, 9, 18, 22; arts 1, 2, 9, 14-17, 21, 22, 24, 29, 44, 46, *supra* note 90; Barelli, *supra* note 30, at 961.

[196] For Australian examples, see Billings, *supra* note 141; Chesterman & Douglas, *supra* note 2.

[197] *See* Otto, *supra* note 2; Falk, *supra* note 30, at 33.

[198] Tennant, *supra* note 10.

[199] *See, e.g.*, Eide, *supra* note 4, at 163-67; MARTÍNEZ-COBO REPORT 1983, *supra* note 38, at para. 42.

[200] *See, e.g.*, UNDRIP preamble, arts. 1, 2, 8-15, 19, 38.

non-discrimination.[201] Similar concerns about the discriminatory aspects of NTER were expressed by the HRC,[202] CERD,[203] and the UN Committee on Economic, Social and Cultural Rights ("CESCR"),[204] as well as by many others within Australia.[205]

Australia is a party to ICERD.[206] Section 9(1) of the RDA, which makes acts of racial discrimination by any person unlawful in Australia, incorporates in full the definition of racial discrimination from article 1.1 ICERD summarized above.[207] Applying this definition to the original NTER income management regime, it is clear that these measures made a distinction on the basis of race, which had the effect of impairing the enjoyment of rights on an equal footing with other Australians in a number of spheres of public life.

As to the first element, state officials asserted that the Intervention was not a matter of race,[208] and sidestepped direct questions about discrimination.[209] However, the legislation itself and its explanatory memoranda leave no room for doubt that NTER was aimed specifically at Aboriginal people. The blanket application of the income management regime, for example, was triggered by an individual's physical presence in "prescribed areas" under the Northern Territory Emergency Response Act *2007* (Cth; NTERA).[210] Subsections 4(2)(a) and (b) of NTERA expressly

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[201] ANAYA REPORT 2010, *supra* note 38, at para. 46 and Appendix B para. 2.

[202] Human Rights Committee, Concluding Observations: Australia, U.N. Doc. CCPR/C/AUS/CO/5 para. 14 (May 7, 2009).

[203] Committee on the Elimination of Racial Discrimination, Urgent Action Letters to the Australian Government (Mar. 13, 2009 and Sept. 28, 2009), *available at* http://www.hrlc.org.au/content/topics/equality/northern-territory-intervention-request-for-urgent-action-cerd/, (last visited Apr. 7, 2011) [hereinafter CERD Urgent Action Letters]; Committee on the Elimination of Racial Discrimination, Concluding Observations: Australia, U.N. Doc. CERD/C/AUS/CO/15-17 (Aug. 27, 2010) [hereinafter CERD Report 2010].

[204] Committee on Economic, Social and Cultural Rights, Concluding Observations: Australia, U.N. Doc. E/C.12/AUS/CO/4, para. 15 (June 12, 2009).

[205] *See, e.g.,* numerous submissions to the Senate Standing Committee on Legal and Constitutional Affairs, *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiri es/2004-07/nt_emergency/submissions/sublist.htm, (last visited Apr. 1, 2011); HREOC SOCIAL JUSTICE REPORT 2007, *supra* note 164; Altman & Hinkson, *supra* note 162; REVIEW BOARD REPORT, *supra* note 24; Vivian, *supra* note 19, at 46; Billings, *supra* notes 141 and 166; Chesterman & Douglas, *supra* note 2; Watson, *supra* note 143; Yananymul Mununggurr, CEO of Laynhapuy Homelands Association Incorporated, *Stop the Intervention: Self-Determination not Assimilation, Homelands address* (June 20, 2009), *available at* http://rollbacktheintervention.wordpress.com/statements (last visited Nov. 10, 2010); ICERD Request, *supra* note 176; Graeme Innes, Race Discrimination Commissioner (HREOC), Address to UN Committee on the Elimination of Racial Discrimination (Aug. 11, 2010), *available at* http://www.hreoc.gov.au/about/media/speeches/race/2010/20100811_CERD.html (last visited 6 Apr. 2011.)

[206] Australia signed on October 13, 1966 and ratified on September 30, 1975.

[207] The Act binds the Crown. *See* RDA, s 6.

[208] Howard Sydney Institute Address, *supra* note 159.

[209] Brough *Insiders* interview, *supra* note 157.

[210] *See* SSAA, ss 123UB and 123TD(a) (both repealed).

tied the meaning of "prescribed areas" to the definition of Aboriginal land within the Aboriginal Land Rights (Northern Territory) Act 1976. The prescribed areas covered about 600,000 kilometers, containing 500 communities occupied almost entirely by Aboriginal people; seventy percent of the Aboriginal population of NT live in those areas.[211]

Putting the racial nature of the regime beyond doubt is the fact that the Intervention legislation expressly excluded the operation of Part II of the RDA in respect of NTER measures.[212] The RDA is an "exhaustive and exclusive" statement of the law on racial discrimination in Australia,[213] enacted for the purpose of implementing ICERD domestically.[214] The inference is that suspending this legislation would only be necessary if NTER measures contravened its protections.[215] This inference is reinforced by Section 10 RDA, which provides that any law operating to deny or reduce the equal enjoyment of rights on a racial basis will have no effect on the enjoyment of those rights. If Australia had not excluded the RDA, Section 10 would have prevented implementation of the racially discriminatory measures of the Intervention.[216]

The conclusion that there was a racial distinction is unavoidable. As for the second element of the discrimination test, which checks the purpose or effect of the distinction, the purpose of the income management regime was to "stem the flow of cash that is expended on substance abuse and gambling" for the protection of children.[217] Leaving aside the question of whether compulsory income management for adults is an appropriate or effective means of protecting children,[218] that protection is, of course, a valid objective. However, the actual effect of the distinction has been a significant impairment of the exercise of various rights protected under international human rights law, such as the right to equality before the law,[219] including in respect of treatment before tribunals,[220] the right to social security,[221] the

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[211] *See* ANAYA REPORT 2010, *supra* note 38.

[212] NTERA, s131(2).

[213] *Viskauskas v Niland* [1983] HCA 15, para. 8 (Austl.).

[214] *Id. See also* RDA, preamble; Koowarta v Bjelke-Petersen [1982] HCA 27, para. 5 (Austl.); Gerhardy v Brown [1985] HCA 11 (Austl.); Viskauskas v Niland [1983] HCA 15 (Austl.).

[215] Arguably it was unnecessary to do this expressly because under Australian law a later Act that is inconsistent with an earlier Act is deemed to repeal the earlier one to the extent of the inconsistency. *See* McIntyre, *supra* note 159, at 107, discussing Western Australia v Ward (2002) 213 CLR 1, 99 (Austl.).

[216] RDA, s 10 reflects ICERD, art. 2(1)(c); see Viskauskas v Niland, *supra* note 213 at para. 10.

[217] NTERB Explanatory Memorandum, *supra* note 16, at 11.

[218] *See* Billings, *supra* note 166; Howard-Wagner, *supra* note 2; Behrendt, *supra* note 183.

[219] UDHR, art. 7; ICCPR, art. 26.

[220] ICERD, art. 5(a); ICCPR, art. 14.

[221] ICESCR, art. 9; ICERD, art. 5(e)(iv). *See also* Billings, *supra* note 166.

right to an effective remedy,[222] the right to enjoy one's culture,[223] and the right to an adequate standard of living.[224] It clearly breaches many provisions of UNDRIP.[225]

The strong emphasis on racial equality that permeates general human rights law, and particularly UNDRIP, has been severely undermined in Australia through NTER. It is inconceivable that the same punitive approaches would be taken in response to reports of child abuse in other sectors of Australian society.[226]

Senior Australian government officials responsible for orchestrating the Intervention were dismissive of UN criticism.[227] International human rights mechanisms have had difficulty breaking through in Australia.[228] However, the federal government's own assessment report also raised discrimination as a serious concern, and recommended action to reinstate the RDA in NT.[229] The resulting legislative amendments implemented some necessary changes,[230] but their practical effect for those already under income management was limited.[231] Critics said nothing less than full reinstatement of the RDA was sufficient and that NTER as redesigned was still discriminatory in fact.[232] Certainly it is unlikely the formal legislative

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[222] ICERD, art. 6. *See also* Wurridjal v Australia, (Kirby J. dissenting), para. 213-4 (about a challenge to compulsory leases under NTER).

[223] ICCPR, art. 27. *See also* Vivian, *supra* note 70.

[224] ICESCR, art. 11; UDHR, art. 25.

[225] *See, e.g.*, arts. 9, 15, 17, 18, 19, 21-23.

[226] *See* Watson, *supra* note 143; Amnesty International, *supra* note 19; Billings, *supra* note 141. *See also* Wurridjal v Australia, (Kirby J. dissenting).

[227] Natasha Robinson, *Howard Ministers Dismiss U.N. Criticism of Indigenous Intervention,* THE AUSTRALIAN, Aug. 29, 2009.

[228] *See* Sylvia Arzey & Luke McNamara, *Invoking International Human Rights Law in a 'Rights-Free Zone': Indigenous Justice Campaigns in Australia*, 33 HUM. RTS. Q. 733 (2011).

[229] REVIEW BOARD REPORT, *supra* note 24.

[230] *See, e.g.*, repealing the provisions expressly excluding anti-discrimination legislation (WRRRDA, Schedule 1) and repealing SSAA, s 123UB (see *supra*, note 166).

[231] WRRRDA repeals SSAA, s 123UB but continues income management for those who were already subject to it under that provision. It also adds new categories of eligibility for income management: "vulnerable welfare recipients", "disengaged youth", and "long-term welfae recipients" (SSAA, ss 123UCA, 123UCB and 123UCC respectively). Concerns about the amended regime were expressed by HREOC. *See* Submission to the ICERD Committee (July 8, 2010), *available at* http://www.hreoc.gov.au/legal/submissions/united_nations/ICERD2010.html, (last visited Apr. 6, 2011) [hereinafter HREOC Submission 2010].

[232] *See* Amnesty International, *supra* note 19; Nicholson et al., *supra* note 19; HREOC Report on RDA and Special Measures, *supra* note 19; Alastair Nicholson, The Failure of the Rudd Government's Aboriginal Policy, Stop the Intervention Collective Sydney (STICS) Forum (March 29, 2010); CERD REPORT 2010, *supra* note 203; Watson, *supra* note 143; Vivian, *supra* note 19; HREOC Submission 2010, *supra* note 231; CGA, Official Committee Hansard, Community Affairs Legislation Committee, Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Feb. 11, 2010), *available at* http://www.aph.gov.au/hansard/senate/commtte e/S12774.pdf [sic], (last visited Apr. 7, 2011) [hereinafter Committee Hansard 2010].

amendments are adequate to ameliorate the serious negative effects of "felt" discrimination and stigma subjectively experienced by Aboriginal people in NT since the Intervention was launched.[233]

In its defense, Australia consistently asserted that the measures taken were necessary to ensure that indigenous people in NT enjoyed their rights on an equal footing with other Australians, and were therefore justified by the doctrine of special measures.[234] Given the *prima facie* discriminatory nature of these measures, even after the 2010 amendments, that assertion demands scrutiny.

*3. The Role of "Special Measures"*

It is well established that formal equality in law is insufficient to guarantee actual freedom from discrimination.[235] As Martínez-Cobo put it, notwithstanding *de jure* equality and the widespread condemnation of discrimination, *de facto* discrimination against indigenous peoples continues around the world.[236] Berhendt argues that in Australia, formal equality offers false promises and has actually allowed indigenous socioeconomic disadvantage to continue.[237]

To counteract this reality, special measures may be required for indigenous peoples to exercise their rights fully and equally with the rest of the population.[238] Article 1.4 ICERD, which is incorporated into Australian federal law through section 8(1) of the RDA, provides that:

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[233] Committee Hansard 2010, *supra* note 232; Schokman, *supra* note 179; Billings, *supra* note 141 and 166; Martiniello, *supra* note 2; Howard-Wagner, *supra* note 2; REVIEW BOARD REPORT, *supra* note 24; Innes, *supra* note 205; Equality Rights Alliance, Women's Experience of Income Management in the Northern Territory (2011), *available at* http://www.equalityrightsalliance.org.au/sites/equalityrightsalliance.org.au/files/docs/readings/income_management_report_v1-4_0.pdf.

[234] *See, e.g.*, NTERB Explanatory Memorandum, *supra* note 16; Special Rapporteur, S. James Anaya, Summary of cases transmitted to Governments and replies received, U.N. Doc. A/HRC/9/9/Add.1 12-14 (Aug. 15, 2008), 12-14; CGA, House of Representatives, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth) Explanatory Memorandum, *available at* http://www.austlii.edu.au/au/legis/cth/bill_em/ssaolararordab2009984/memo_0.html (last visited Apr. 7, 2011) [hereinafter "WRRRDA Explanatory Memorandum"].

[235] Minority Schools in Albania, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 64, at 19 (Apr. 6); South West Africa Cases, *supra* note 193, at para. 305-306, per Tanaka J (dissent); Maya (Toledo) v. Belize, *supra* note 44, at para. 162, 169; Gerhardy v Brown [1985] HCA 11, para. 25 per Brennan J (Austl.); YATAMA v. Nicaragua, *supra* note 130; Endorois v. Kenya, *supra* note 130; HRC, CCPR General Comment No. 18: Non-discrimination, UN Doc HRI/GEN/1/Rev.7, 146. (Nov. 10, 1989). *See also,* ILO Convention 169, art. 6(1)(b)

[236] Special Rapporteur, *Study on the Problem of Discrimination Against Indigenous Populations: Final Report, Part I*, U.N. Doc. E/CN.4/Sub.2/476/Add.3 (June 26, 1981) (by José Martínez-Cobo).

[237] Larissa Behrendt, *Indigenous Self-Determination: Rethinking the Relationship Between Rights and Economic Development,* 24 U. NEW S. WALES L.J. 850, para. 16-17 (2001).

[238] HRC, General Comment No. 23, *supra* note 78, para. 6.2, 7; Endorois v. Kenya, *supra* note 130, at para. 196; Maya (Toledo) v. Belize, *supra* note 44, at para. 96.

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection . . . shall not be deemed racial discrimination.

The serious socio-economic problems affecting indigenous Australians in NT mean special measures are not only justified but urgently required.[239] States parties to ICERD are obliged to take affirmative action to ensure the adequate development and protection of indigenous peoples where necessary for the purpose of guaranteeing full enjoyment of their rights.[240] Article 21(2) of UNDRIP further provides that states shall take special measures where necessary to ensure ongoing improvement in living conditions. However, Australia's characterization of the Intervention provisions as special measures [241] does not satisfy the established international interpretation.[242]

Many have observed that if Australia believed NTER amounted to special measures, there would have been no need to suspend the RDA in the first place, because Section 8(1) expressly allows special measures as a legitimate exception to the prohibition against racial discrimination.[243] The federal government acknowledged this inconsistency in taking steps partially to reinstate the RDA, but continued to rely on special measures as justification for NTER[244]–which in turn supports the conclusion that NTER continued to be characterized by distinctions made on the basis of race, despite the amendments. An important question is whether provisions that *negatively* affect the target group can qualify as special measures.

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[239] ANAYA REPORT 2010, *supra* note 38, at Appendix B, para. 3.

[240] ICERD, art. 2(2); Rights of the Undocumented Migrants, *supra* note 193, at para. 104.

[241] NTERA, s133(1).

[242] *See, e.g.*, ANAYA REPORT 2010, *supra* note 38; CERD REPORT 2010, *supra* note 203; HREOC SOCIAL JUSTICE REPORT 2007, *supra* note 164; Vivian, *supra* note 19; Hunyor, *supra* note 158; Amnesty International, *supra* note 19; Billings, *supra* notes 141 and 166; Chesterman & Douglas, *supra* note 2; Nicholson et al., *supra* note 19.

[243] *See, e.g.*, submissions 97 (Australian Council of Social Service) and 52 (Law Council of Australia) to the Senate Legal and Constitutional Affairs Committee (2007), *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/nt_emergency/submissions/sublist.htm, (last visited Apr. 2, 2011); Watson, *supra* note 143. One exception is s10(3) RDA , which excludes from "special measures" provisions taking control of Aboriginal land. This would affect some aspects of NTER, e.g, compulsory leases.

[244] *E.g.*, CGA, *Future Directions for the Northern Territory Emergency Response – Discussion Paper* (2009), *available at* http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Pages/default.aspx, last accessed 6 April 2011; WRRRDA Explanatory Memorandum, above n 234. The special measures justification is continued in the new legislation: see *Stronger Futures in the Northern Territory Act 2012* (Cth), ss 7, 33, 37; CGA, *House of Representatives, Stronger Futures in the Northern Territory Bill* (Cth) Explanatory Memorandum, *available at* http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/cth/bill_em/sfitntb2011536/memo_0.html?stem=0&synonyms=0&query=stronger%20futures, (last accessed Jan. 22, 2012).

Internationally, the position is unambiguous. The language of ICERD and UNDRIP implies preferential treatment of the targeted group, not treatment that limits or infringes rights.[245] ILO Convention 169 puts this beyond doubt in the indigenous context,[246] providing that special measures shall not be contrary to the freely-expressed wishes of the peoples concerned, and that special measures shall not prejudice the enjoyment, without discrimination, of other rights.[247]

In Australia, however, the question is not settled.[248] Differences in judicial interpretation[249] have blurred the boundaries between positive measures that benefit disadvantaged groups, and measures that take benefits away because it is "good for them."[250] This shift seems to indicate a return to paternalistic notions familiar to indigenous Australians,[251] and raises concerns that Australia's use of special measures might harm rather than benefit the most vulnerable groups. From an international legal perspective, Australia is bound to give effect to the prevailing interpretation under international law; domestic law cannot be an excuse for violating international obligations.[252]

The CERD has clarified the test for special measures as follows:

> Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. ... States parties should ensure that special measures are designed and implemented on the basis of prior consultation

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[245] ANAYA REPORT 2010, *supra* note 38.

[246] Australia has not ratified ILO Convention 169, but see *supra*, note 29.

[247] ILO Convention 169, art. 4(3).

[248] Vivian, *supra* note 19; Hunyor, *supra* note 158; HREOC Social Justice Report 2007, *supra* note 164.

[249] *See, e.g.*, Gerhardy v Brown [1985] HCA 11 (Austl.); Vanstone v Clark (2005) 147 FCR 299 (Austl.); Bropho v WA [2007] FCA 519 (Austl.); Bropho v WA [2008] FCAFC 100 (Austl.); *Aurukun Shire* Council and Anor v CEO Office of Liquor Gaming and Racing in the Department of Treasury [2010] QCA 37 (Austl.); Morton v Queensland Police Service [2010] QCA 160 (Austl.); Maloney v Queensland Police Service [2011] QDC 139 (Austl.).

[250] *See* Hunyor, *supra* note 158, at 63.

[251] *See, e.g.*, HREOC, REPORT OF THE NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES, BRINGING THEM HOME (1997), *available at* http://www.hreoc.gov.au/pdf/social_justice /bringing_them_home_report.pdfa; Billings, *supra* note 166, at 181-82; Dodson & Strelein, *supra* note 2; Sutton, *supra* note 166; Anthony, *supra* note 166; Cobb, *supra* note 30; Billings, *supra* note 141; Megan Davis, *A Culture of Disrespect: Indigenous Peoples and Australian Public Institutions*, 8 U. TECH. SYDNEY L. REV. 135 (2006).

[252] This principle is enshrined in VCLT, art 27, and the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, art 32, and it is an established rule of customary law: Pulp Mills on the River Uruguay (Argentina v Uruguay), Judgment of 20 April 2010, para. 121; *See also* ANAYA REPORT 2010, *supra* note 38, at Appendix B, para. 20.

> with affected communities and the active participation of such communities.[253]

Taking "the situation to be remedied" in CERD's test to be "the child abuse problem in Aboriginal communities" as the primary trigger for the Intervention, it is difficult to see how measures like blanket income management were appropriate, legitimate, and necessary remedies.[254] The objective of child protection is certainly worthy, but the relationship between the objective and the approach was so tenuous as to lead to skepticism about the motivations behind NTER.[255]

As for fairness and proportionality, income management was applied compulsorily, with no right of external review, on the basis of physical presence in certain areas distinguished by race–not on the basis of, for example, a given welfare recipient's personal decision to participate voluntarily in income management, or a proven inability to manage his or her finances coupled with a request for assistance, or a demonstrated problem of child abuse, neglect, alcoholism or gambling in any individual case. Although the 2009 and 2010 amendments made some attempt to change this, by removing references to race and providing for appeals and exemptions, it is still the case that the income management regime continues disproportionately to target Aboriginal people.[256]

The blanket income management system represents discrimination that is indiscriminate: it contravenes Article 9 of UNDRIP, discriminating against individuals within the group based on racist generalizations about the group as a whole. It has been described as equating Aboriginality with a lack of capacity and assuming that all Aboriginal people are irresponsible, "feckless squanderers."[257] This stigmatization arguably violates Article 15 of UNDRIP. It contributes to a focus on the "unworthiness" of the people being targeted, instead of the problems to be addressed.[258]

Thus NTER income management measures did not respect the principles of fairness or proportionality in terms of the CERD requirements.

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[253] Committee on the Elimination of Racial Discrimination [CERD], General Recommendation No XXXII, U.N. Doc. CERD/C/GC/32, para. 16, 18 (Sept. 24, 2009).

[254] *See* discussion in Anaya Report 2010, *supra* note 38; Hunyor, *supra* note 158.

[255] *See, e.g.*, Martiniello, *supra* note 2; Howard-Wagner, *supra* note 2; SENATE COMM. REPORT 2007, *supra* note 9, at 49-60, 51 (Andrew Bartlett, Queensland Democrat, Senator, minority report); Watson, *supra* note 143; Billings, *supra* note 166; Melinda Hinkson, *Introduction: In the Name of the Child, in* Altman & Hinkson (eds.), *supra* note 162, at 1-12; Pat Turner & Nicole Watson, *The Trojan Horse, in* Altman & Hinkson (eds.), *supra* note 162, at 205-12.

[256] ALASTAIR NICHOLSON ET AL., LISTENING BUT NOT HEARING: A RESPONSE TO NTER STRONGER FUTURES CONSULTATIONS JUNE TO AUGUST 2011, 8 (2011).

[257] Sutton, *supra* note 166. *See also* Billings, *supra* note 141; Anthony, *supra* note 166.

[258] Chesterman & Douglas, *supra* note 2, at 82; Billings, *supra* note 141, at 37.

Nor can the measures be described as temporary; the initial twelve-month period of compulsory income management was extended, despite the lack of clear evidence on whether it was meeting its objectives,[259] and despite the recommendations of NTER Review Board.[260] Income management has now been extended yet again, although in modified form, in connection with the Stronger Futures package.[261] As for consultation and participation, identified as crucial in the CERD test,[262] the discussion above has shown that no efforts were made to consult with Aboriginal peoples about NTER before it was launched, and consultations about the redesign took place after the government had already decided to continue and extend income management.

The effect on those outside the affected group is another relevant factor in assessing special measures.[263] This is related to the temporal criterion: special measures must not be allowed to create unfair discrimination against those outside the group receiving preferential treatment.[264] In NTER context, however, the effect was the opposite–those outside the group receiving 'preferential' treatment did not want to be a part of it. Representatives of the refugee community expressed grave concern at the possibility that newly-arrived refugees would fall within the income management regime following the 2010 amendments broadening its scope.[265] The fact that the special treatment is not desirable to people outside the affected group reinforces the argument that these were not special measures within the ordinary use of the term.

In summary, Australia's reliance on "special measures" to justify the racial distinction in NTER was not valid under international law.[266]

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[259] *See* CIRCA REPORT 2009, *supra* note 183; AUS. INST. OF HEALTH AND WELFARE, REPORT ON THE EVALUATION OF INCOME MANAGEMENT IN THE NORTHERN TERRITORY (2009), *available at* http://www.fahcsia.gov.au/about/publicationsarticles/research/occasional/Documents/op34/OP34.pdf [hereinafter AIHW REPORT]; HREOC Submission 2010, *supra* note 231.

[260] REVIEW BOARD REPORT, *supra* note 24.

[261] *Social Security Legislation Amendment Act 2012* (Cth) (Austl.). A proposal to delete the schedule failed. *See Stronger Futures* Senate Hansard 2012*, supra* note 183, at 109-16.

[262] *See also Gerhardy v Brown* [1985] HCA 11 (Austl.); Hunyor, *supra* note 158.

[263] *See* Gillian Triggs, *The Rights of Peoples and Individual Rights: Conflict or Harmony?, in* Brownlie, *supra* note 1, at 141-57.

[264] *Gerhardy v Brown* [1985] HCA 11, para. 38 (per Brennan J) (Austl.).

[265] *See supra*, entire note 231; Refugee Council of Australia, Letter to Dr. Jeff Harmer, Secretary, Department of Families, Housing, Community Services, and Indigenous Affairs ("FAHCSIA") (Sept. 7, 2010), *available at* http://www.refugeecouncil.org.au/docs/89current/100907_FAHCSIA_income_ mgt.pdf.

[266] It is unlikely to be challenged domestically, however, given the obstacles, especially, for example, especially Judge Kirby's dissent. *See Wurridjal v Australia* [2009] HCA 2,); McIntyre, *supra* note 159; Hilary Charlesworth, *The High Court on Constitutional Law: The 2004 Term*, 28 U. NEW S. WALES L.J. 1, 2 (2005). *See also* Steiner, Alston & Goodman, *supra* note 193, 913-14 (on Australia's indifference to HRC recommendations following individual complaints under the ICCPR Protocol I process).

Amnesty International described it as a travesty that demeans the concept for short-term political gain.[267] The example of compulsory income management does not satisfy the CERD requirements, and there is not enough concrete evidence to say it is ensuring ongoing improvement in living conditions, in terms of Article 21(2) of UNDRIP.[268]

Australia's assertion that the Intervention could be justified on the grounds of "legitimate differential treatment" that does not need to meet the special measures test was equally dubious.[269] As a general principle, treatment that limits rights is only ever justified if it is proportionate to and necessary for the achievement of a legitimate aim;[270] it must have a reasonable and objective justification, and remain consistent with other rights.[271] NTER failed on all counts.[272]

In launching the Intervention, Australia failed to implement the standards of non-discrimination that are recognized in UNDRIP as integral to indigenous peoples' enjoyment of their rights. Instead of adopting a progressive model of equality, partnership, and respect in tackling the problem of indigenous disadvantage, as urged by Little Children Are Sacred, NTER reflects paternalistic attitudes reminiscent of the colonial era. This initial approach has been severely detrimental to the ongoing success of the Intervention measures, despite attempts to improve it since 2007.

The right to freedom from discrimination, the first essential foundation for self-determination, was wholly lacking. The next section will examine the second foundation: the right to meaningful participation in decision-making.

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[267] Amnesty International*, supra* note 19.

[268] THE AIHW REPORT, *supra* entire note 259, and NTER Evaluation Report 2011 provided evidence to suggest that income management was having positive results for a number of participants, but acknowledged that several limitations in the research such as small sample sizes, nature of the surveys undertaken, and the lack of a comparison group or historical data meant that the overall evidence of effectiveness was not strong. For corroboration of the claim that there is inadequate reliable data on whether or not income management is effective for achieving its stated goals, see Luke Buckmaster & Carol Ey, *Is income management working?* (Parliament of Australia, Background Note, June 5, 2012), *available at* http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/IncomeManagement (last visited July 8, 2012).

[269] ANAYA REPORT 2010, *supra* note 38, at Appendix B, para. 55.

[270] Handyside v. U.K., 1 Eur. Ct. H.R. 737 (ECHR) (1976); Endorois v. Kenya, *supra* note 130, at para. 214.

[271] *Sandra Lovelace v. Canada*, HRC, UN Doc A/36/40 para. 15 (1981); Dann v. United States, *supra* note 44.

[272] Vivian, *supra* note 19.

### *C. The Right to Participation*

#### *1. International Law*

Indigenous peoples' right to participation is a core principle and right under international human rights law.[273] In 1997, CERD urged states to "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent."[274]

The right to participation is emphasized repeatedly in UNDRIP, as discussed above in the analysis of the meaning of self-determination. Articles 3-5, 18, 19 and 23 are of particular importance. Promoting full and effective participation by indigenous peoples is one of the goals in the program of action for the Second Decade of the World's Indigenous People (2005-2015),[275] and the principles of participation and consultation underpin the recommendations of each session of the United Nations Permanent Forum on Indigenous Issues ("UNPFII").[276]

At the international level, the inclusive procedure adopted by the relevant UN bodies during the drafting of UNDRIP recognized the importance of involving indigenous peoples themselves in creating the regime that is being developed to protect their rights and interests.[277] This shift away from the typically state-centered creation of international law has blazed the trail for significantly increased indigenous participation at the international level.[278] The formation, composition and ongoing mandate of UNPFII will help ensure that that participation continues.[279] In Tennant's words, "participation is now the hinge on which the whole political field of indigenous peoples and international institutions turns."[280]

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[273] Expert Mechanism on the Rights of Indigenous Peoples, *Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making*, U.N. Doc. A/HRC/EMRIP/2010/2 (May 17, 2010) [hereinafter EMRIP Report].

[274] CERD, General Recommendation No XXIII on Indigenous Peoples (Aug. 18, 1997), U.N. Doc. A/52/18, Annex V, para. 4(d). *See also* Human Rights Committee, *General Comment No 23*, *supra* note 78, at para. 7.

[275] U.S. General Assembly, Draft Programme of Action for the Second International Decade of the World's Indigenous People, U.N. Doc. A/60/270 (Aug. 18, 2005).

[276] *See* UNPFII, ENGAGING INDIGENOUS PEOPLES IN GOVERNANCE PROCESSES: INTERNATIONAL LEGAL AND POLICY FRAMEWORKS FOR ENGAGEMENT (Aug. 15, 2005), *available at* http://www.un.org/esa/socdev/unpfii/ documents/engagement_background_en.pdf, para. 11.

[277] *See, e.g.,* Daes*, supra* note 33; Eide, *supra* note 4.

[278] See UNDRIP, art. 41; Lindroth, *supra* note 39, at 242; Daes, *supra* note 33, at 10; U.N. Inter-Agency Support Group on Indigenous Issues, *UN Development Group Guidelines on Indigenous Peoples' Issues* (2009), *available at* http://www.un.org/esa/socdev/unpfii/documents/ UNDG_guidelines_EN.pdf [hereinafter UNDG Guidelines]. Compare Otto, *supra* note 2, at 102.

[279] *See* Lindroth, *supra* note 39.

[280] Tennant, *supra* note 10, at 4 (although he warns against treating institutional participation as an end in itself).

At the national level, UNDRIP distinguishes between state-wide "external" participation and local "internal" participation.[281] External participation reflects the right to participation in the conduct of public affairs enshrined in Article 25 of ICCPR,[282] often described as a right to political participation, which is arguably emerging as a norm of customary law.[283] It is significant that UNDRIP specifically recognizes political participation as a group right, capable of exercise by indigenous peoples collectively,[284] where previously it was only recognized as an individual right.[285] Accordingly, there will be a need to strengthen indigenous peoples' own representative institutions.[286]

It need hardly be reiterated that rights of external, political participation–including the right to vote and the emerging right to democratic governance–are a vital component of self-determination for any people. But internal participation is the "extra dimension" of participation that provides the essential element of empowerment in UNDRIP: meaningful participation in decision-making about indigenous peoples' local affairs and interests.[287] The right to participation embodied in UNDRIP is broader than simply political participation, requiring both the internal and external elements of participation combined, as fundamental prerequisites for self-determination.[288]

Three points support this argument. First, confining the label of participation to political concepts pushes indigenous peoples towards traditionally Western decision-making processes and institutions, and thus

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[281] EMRIP Report, *supra* note 273, at 3.

[282] UNDRIP art. 5; UDHR art. 21; ILO Convention 169 arts. 6, 7.

[283] *See, e.g.,* Gregory Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992); Thomas Franck, *The Emerging Right to Democratic Governance* 86 AM. J. INT'L L. 46 (1992); Maia Campbell, *The Right of Indigenous Peoples to Political Participation and the Case of YATAMA v. Nicaragua*, 24 ARIZ. J. INT'L & COMP. L. 499 (2007).

[284] UNDRIP, art. 5.

[285] Marshall v. Canada, HRC, U.N. Doc. CCPR/C/43/D/205/l986 (1991); *Diergaardt v Namibia*, para. 10.8 (compare the separate opinion by Judge Scheinin).

[286] XANTHAKI, *supra* note 29, at 111; Tennant, *supra* note 10.

[287] The word "meaningful" does not appear in UNDRIP, nor does "effective," but the notion is implicit in the context of UNDRIP–otherwise participation could be reduced to token consultations. This argument is supported by the Declaration on the Right to Development art. 2(3) G.A. Res. 41/128 (Dec. 28, 1986);Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities art. 2 G.A. Res. 47/135 (Dec. 8, 1992), art. 2; General Comment No 23*, supra* note 78; Endorois v. Kenya, *supra* note 130, at paras. 281-283; YATAMA v. Nicaragua, *supra* note 130, at para. 225; Saramaka v. Suriname, *supra* note 130, paras. 129, 147. *See also* Myntti, *supra* note 35, at 122-130.

[288] The rights in Article 25 of the ICCPR are related to but distinct from self-determination. HRC, General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote) 167, U.N. Doc. HRI/GEN/1/Rev.7 (1996).

reduces the empowerment to participate as they see fit, including through their own institutions and structures of governance.[289]

Second, focusing solely on the political sphere sidelines non-political decision-making processes that may be important for indigenous peoples, for example, when exercising their socio-economic and cultural rights under UNDRIP. Such decisions need to be made at the most local level possible in order to be effective.[290] The interpretation of the right to participation as an integral part of self-determination needs to be broad enough to encompass decision-making in all spheres of public life, not just political decisions.[291]

Third, if expressed solely in political terms, the right to participation loses much of its value and power for indigenous peoples. Individual indigenous persons are guaranteed participation in political processes by Article 25 of ICCPR. However, it is clear from the statistics and jurisprudence that indigenous peoples in many states with functioning democracies and ostensibly representative governments, including Australia, do not always enjoy any effective right of participation in the decisions that affect their lives.[292] UNDRIP recognizes that a more direct level of participation is required, in a way that is meaningful for indigenous peoples, if they are to have an effective role in controlling their futures.[293] This is an area where special measures may be necessary.[294]

At its lowest level, the right to participation in decision-making corresponds to a basic duty on states to consult with indigenous peoples before making decisions about issues that affect their interests.[295] States parties to ILO Convention 169 are already bound by this duty,[296] and the ILA has described it as a rule of customary law.[297] Regional jurisprudence shows

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[289] YATAMA v. Nicaragua, *supra* note 130; Mary Ellen Turpel, *Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, 25 CORNELL INT'L L.J. 579 (1992).

[290] Anaya (1993), *supra* note 35, at 152.

[291] This argument is supported by the Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government (1991), U.N. Doc. E/CN.4/1992/42.

[292] Martínez-Cobo Report 1983, *supra* note 37; EMRIP Report, *supra* note 273; Saramaka v. Suriname, *supra* note 130; Endorois v. Kenya, *supra* note 130; Maya (Toledo) v. Belize, *supra* note 44; Diergaardt v Namibia, No. 760/1997, U.N. Doc. CCPR/C/69/D/760/1997 (2000) (Judge Scheinin concurring).

[293] YATAMA v. Nicaragua, *supra* note 130, at para. 201, 207; *id.* at para. 30-31 (García-Ramírez concurrence); EMRIP Report, *supra* note 273, at para. 12; HRC, *General Comment No. 23*, *supra* note 77, at para. 7.

[294] Quane, *supra* note 31, at 283; Campbell, *supra* note 283; Turpel, *supra* note 289.

[295] *See, e.g.*, UNDRIP at arts. 15(2), 17(2), 30, 36, 38; CERD, *General Recommendation No XXIII*, *supra* note 274; Martínez-Cobo Report 1983, *supra* note 37; Saramaka v. Suriname, *supra* note 130; Dann v. United States, *supra* note 44.

[296] International Labor Organization ("ILO"), Convention No. 169 art. 6(2) (1989).

[297] International Law Association Report, *supra* note 3, at 852.

that it requires good faith negotiations, through culturally appropriate procedures, with the object of achieving agreement.[298] This objective matches the higher standard expressed in some of UNDRIP's provisions.[299] The threshold is one of constant two-way communication from an early stage in the planning of any initiative.[300] The duty is not discharged merely by presenting information once the decision has been made,[301] or when approval is required.[302] In some circumstances, the duty of consultation will not be discharged unless there is actual consent.[303]

At its highest level (short of full secession and independence), the right to participation amounts to internal autonomy or self-government as provided in Article 4 of UNDRIP.[304] However, that option is unlikely to be feasible or desirable for all indigenous peoples, particularly small communities without the resources, infrastructure and population to sustain it[305]–and even for those that do have the potential for full autonomous government, it will take time to develop that capacity. Meaningful participation in decision-making is the first essential step towards that end, if that is the goal; otherwise, it is an empowering goal in itself.

Thus an expansive interpretation of the concept of participation underpinning self-determination sees bare consultation and full autonomy as different points along a continuum. The right necessarily involves a choice for indigenous peoples about the desired form and degree of participation along that scale.[306] Of course, indigenous peoples' right to participation is not absolute. It is clear it will be tempered by other practical and political considerations within the state, not least of which will be the rights of other

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[298] Maya (Toledo) v Belize*, supra* note 44; Saramaka v. Suriname *supra* note 130; Endorois v Kenya, *supra* note 130*,* at para. 289; Dann v. United States, *supra* note 44, at para. 165. *See* Nuclear Tests (Australia v. France) 1974 I.C.J. 268, para. 46 (Dec. 20) and Nuclear Tests (New Zealand v. France) 1974 I.C.J. 473, para. 49 (Dec. 20) (stating the customary law principle of good faith (reflected in article 26 of VCLT) is "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source"). *See also* Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of April 20, 2010, paras. 145-46.

[299] *See, e.g.,* UNDRIP at arts. 19, 32.

[300] Saramaka v. Suriname*, supra* note 130; Endorois v. Kenya, *supra* note 130, at para. 289.

[301] Dann v. United States, *supra* note 44, at para. 281; Wurridjal v Australia*,* [2009] HCA 2 (per Judge Kirby's dissent).

[302] Saramaka v. Suriname, *supra* note 130, at para. 133.

[303] *Id.*, at para. 134; UNDRIP arts. 10, 29.

[304] For a typology of UNDRIP's provisions on participation, see Quane, *supra* note 31, at 275-84. [

[305] Eide, *supra* note 4, at 199.

[306] MARTÍNEZ-COBO REPORT 1983, *supra* note 38.

citizens and groups,[307] and may be subject to reasonable restrictions according to the usual standards for any limitation on rights.[308]

The important point is that UNDRIP recognizes that bare political or "external" participation has not been enough to ensure the full enjoyment by indigenous peoples of all their rights. The extra element of "internal" participation is also required, and it is these two forms of participation in combination that join with non-discrimination to create the foundations of indigenous self-determination.

*2. Participation in NTER*

The very language of the Intervention signals that it was imposed from outside, rather than having its genesis within the communities it purported to serve. Despite the clear exhortations of Little Children Are Sacred, there was no process of consultation at all before the Intervention was launched–in some cases there was not even time for notification before police and military began arriving in the communities.[309] Nearly 500 pages of draft legislation were rushed through Parliament with such haste that there was no time for genuine public debate.[310] Instead, Aboriginal peoples in NT were simply presented with a "legislative *fait accompli*."[311]

It is obvious from Little Children Are Sacred that the Board saw empowerment and participation as the way forward for indigenous communities in NT,[312] and that community members consulted by the Board strongly supported the methods that they used.[313] The emphasis by both sides on the need for genuine consultation and engagement mirrors the message from the international community at the time, with UNDRIP adopted by the G.A. just a month after NTER was launched.

However, Australia prioritized urgency at the expense of all else, arguing that "action cannot be delayed by concerns that it is 'culturally

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[307] *See, e.g.,* Murphy, *supra* note 2; Kingsbury, *supra* note 79; Vivian, *supra* note 19; Quane, *supra* note 31.

[308] Mahuika v. New Zealand, *supra* note 70; Marshall v. Canada Tribunal, U.N. Doc. CCPR/C/43/D/205/l986 (Dec. 3, 1991), at para. 5.4-5.5.

[309] Vivian, *supra* note 70, at 13.

[310] Numerous individuals and organizations expressed serious concern about this (and many other aspects of the Intervention) to the Senate Legal and Constitutional Affairs Committee. *See* http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/nt_emergency/submissions/sublist.htm; Committee Hansard 2007, *supra* note 160; Bartlett, *supra* note 255. *See also* COERCIVE RECONCILIATION, *supra* note 162.

[311] *Wurridjal v Australia* [2009] HCA 2, at para. 234 (per Judge Kirby's dissent).

[312] *See* Little Children Are Sacred, *supra* note 14, at 52 (yet even the report's authors were not consulted before the Intervention legislation was drafted). *See* Committee Hansard 2007, *supra* note 160, at 13.

[313] The report quotes one Warlpiri elder as saying "We never have meetings like this. If we have more meetings like this we will have more answers." Little Children Are Sacred, *supra* note 14, at 52.

inappropriate.'"[314] The language of "crisis" and "emergency" assisted to stifle debate and prevent scrutiny of the proposed measures, with those arguing for more careful consideration branded as tolerating child abuse.[315] The sudden, non-consultative manner of implementing a large number of major changes at once, and strong negative reactions to compulsory income management in particular, have contributed to a generalized and ongoing lack of engagement with measures which might otherwise have been well received.[316] NTER approach undermined its own effectiveness from the outset by generating a widespread sense of betrayal, anger and loss of trust in the communities it purported to serve.[317]

The complete lack of consultation before the Intervention was launched violated the standards of internal participation enshrined in UNDRIP, including in Articles 18,[318] 19,[319] and 23.[320]

Following severe criticism about the lack of participation,[321] Australia acknowledged that consultations had been deficient, and from June to August 2009 it undertook a wide-reaching program of consultations on the "redesign" of the key NTER measures.[322] This was undoubtedly a step in

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[314] Howard, *supra* note 159.

[315] *See generally* Bartlett, *supra* note 255; Howard-Wagner, *supra* note 2; Billings, *supra* note 141; Boyd Hunter, *Conspicuous Compassion and Wicked Problems: The Howard Government's National Emergency in Indigenous Affairs*, 14 AGENDA 35 (2007); Raimond Gaita, *The Moral Force of Reconciliation, in* COERCIVE RECONCILIATION, *supra* note 162, at 295-306.

[316] NTER Evaluation Report 2011, *supra* note 171, at 5, 11-14, 363.

[317] REVIEW BOARD REPORT, *supra* note 24, at 8.

[318] UNDRIP art. 18 provides: "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."

[319] *Id.* at art. 19 (providing: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.").

[320] *Id.* at art. 23 (providing: "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.").

[321] *See, e.g.,* HREOC SOCIAL JUSTICE REPORT 2007, *supra* note 164; REVIEW BOARD REPORT, *supra* note 24; ANAYA REPORT 2008, *supra* note 30; Special Rapporteur Anaya, *Summary of Cases Transmitted to Governments and Replies Received*, U.N. Doc. A/HRC/9/9/Add.1 (Aug. 15, 2008); ICERD Request, *supra* note 176; CERD Urgent Actions Letters, *supra* note 203; CIRCA REPORT 2009, *supra* note 183; AIHW REPORT, *supra* note 259.

[322] *See Future Directions*, *supra* note 244; CGA, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act, and Strengthening of the Northern Territory Emergency Response* (November 2009), *available at* http://www.fahcsia. gov.au/sa/indigenous/pubs/ nter_reports/policy_state ment_nter/Pages/default.aspx (last visited Apr. 6, 2011) [hereinafter CGA Policy Statement]; CGA, REPORT ON NTER REDESIGN CONSULTATIONS (2009), *available at*

the right direction, but the consultation efforts have been criticized for having a predetermined outcome,[323] failing to involve Aboriginal people in the design and implementation of the consultations themselves, and failing adequately to explain complex legal concepts or use interpreters.[324] The 2009 consultations were aimed at defining provisions more clearly as special measures, rather than ensuring they were not racially discriminatory.[325] They sought to maintain and strengthen core NTER measures, for example compulsory income management, despite calls for it to be abolished, or at least significantly amended so that it only applied to voluntary participants or those with a genuine need for assistance identified by their community.[326] All of this suggests the consultations did not meet the basic criteria for the duty to consult outlined above. The process was more about obtaining some measure of community approval of decisions that had already been made, instead of being genuinely directed towards achieving agreement with indigenous peoples, as a two-way process of good faith, about how to develop measures that would affect their ongoing rights.

The Select Committee on Regional and Remote Indigenous Communities, appointed to evaluate the effectiveness of NTER measures between 2008-2010, reported in 2009 that it had not received any evidence to indicate the experience of people in NTER communities had improved in terms of consultation and engagement, and observed that the federal government's report on the adequacy of the consultations was contradicted by the independent report named Will They Be Heard? that was launched the same day.[327] Research on "engagement" included as part of the 2011 NTER Evaluation Report highlighted serious deficiencies in important areas related to participation in decision-making, including inadequate use of interpreters,

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http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Pages/report_nter_redesign_consultations.aspx (last visited Apr. 6, 2011) [hereinafter CGA 2009 REPORT].

[323] For example, the government had already decided to keep the compulsory income management regime: the only alternative open for discussion was whether to incorporate mechanisms for people to prove they deserved an exemption.

[324] Nicholson et al., *supra* note 19; CIRCA REPORT 2009, *supra* note 183; Nicholson, *supra* note 232; Vivian, *supra* note 19; McIntyre, *supra* note 159, at 109. Besides the provisions on participation, the failure to use interpreters also breaches UNDRIP, art. 13(2).

[325] AUSTRALIAN AND NORTHERN TERRITORY GOVERNMENTS, RESPONSE TO THE REPORT OF NTER REVIEW BOARD (2008), *available at* http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/response_to_reportNT ER/Pages/default.aspx, (last visited Apr. 6, 2011); CGA Policy Statement, *supra* note 322; HREOC Submission 2010, *supra* note 231; WRRRDA Explanatory Memorandum, *supra* note 234.

[326] Nicholson et al., *supra* note 19 (providing the transcripts of consultations and discussions).

[327] CGA, THIRD REPORT OF THE SELECT COMMITTEE ON REGIONAL AND REMOTE INDIGENOUS COMMUNITIES (Nov. 2009), *available at* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=indig_ctte/reports/index.htm (last visited July 8, 2012), para. 3.77. *See* Nicholson et al., *supra* note 19 for the *Will They Be Heard?* Report.

failure to tailor engagement processes to local cultures, inadequate respect for the need for slower timeframes to allow for genuine consultation with communities, and a need to facilitate increased capacity for local governance by using existing structures within communities.[328] At the other end of the spectrum, there is also evidence that in some cases communities have felt overwhelmed by too many consultations on certain issues, with high numbers of visits from government officials causing a burden to communities.[329] These failings point to an ongoing need for improved Aboriginal engagement and participation in the actual design and implementation of consultation processes, so that they are relevant, constructive, and meaningful.

In summary, the level of indigenous participation in decision-making in NT during the Intervention fell well below the aspirations of consensus, cooperation, and consent in UNDRIP, with breaches of important provisions including Articles 18, 19, and 23. The redesign consultations were an improvement on no consultations at all, but they did not live up to the standards embodied in UNDRIP and did little to provide Aboriginal people with meaningful opportunities to participate in decisions affecting their rights. The focus here is on evolving standards of so-called internal participation, not voting rights,[330] but it is arguable that even the established ICCPR right to political participation has had no true effect for those targeted by the Intervention–their voices were not heard.

Any possibility of autonomy and self-government was completely out of the question under the paternalistic approach taken in NTER. The initial absence of consultation and the flaws in the redesign process have undermined ongoing decision-making processes and local governance in communities, which perpetuates the popular stigmatization of Aboriginal people as unable to help themselves.[331] Although UNDRIP's enhanced standards of internal participation may not yet be binding on Australia as a matter of international law,[332] similar objectives are already recognized in

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[328] NTER EVALUATION REPORT 2011*, supra* note 171, at 136-140.

[329] *Id.* at 5, 17-18, 152-53.

[330] Even those voting rights which have come were received only relatively recently: Aboriginal people did not have a universal right to vote until 1962, and voting was not compulsory (as for other Australians) until 1982–for a long time it was illegal to encourage Aboriginal people to vote. *See* George Williams, *Race and the Australian Constitution: From Federation to Reconciliation*, 38 OSGOODE HALL L.J. 643, 651-52 (2000); Murphy, *supra* note 2.

[331] ANAYA REPORT 2010, *supra* note 38, at para. 59 and Appendix B, para. 3; Howard-Wagner, *supra* note 2; *Still Paying the Price for Benign Intentions?*, *supra* note 141; *Social Welfare Experiments in Australia*, *supra* note 166.

[332] *Contrast* ILA Report, *supra* note 3, at 852 for the view that the duty to consult is customary law.

Australian legislation,[333] and it should be recalled that CERD had been urging ICERD states parties to adhere to such standards for at least ten years before UNDRIP was adopted.[334]

### *D. Conclusion*

Starting from the understanding that self-determination is about a people's empowerment to control its own affairs, it is clear from the foregoing analysis that the original NTER violated the right to self-determination recognized in UNDRIP by failing to uphold the basic norms that underpin it: meaningful participation in decision-making and the right to freedom from discrimination.[335] It did not even measure up to the limited interpretation of self-determination that Australia endorsed when it announced its support for UNDRIP in 2009,[336] let alone the high standard it supported during earlier phases of the UNDRIP drafting process.[337] The Little Children Are Sacred report which triggered the Intervention identified the disempowerment of Aboriginal men and women as a matter requiring urgent attention,[338] but Australia's response to that report disempowered them further still.

The Intervention was missing the crucial element of empowerment from its inception. Attempts to patch it up through partial reinstatement of the RDA and flawed consultations on the redesign were inadequate to reverse that effect as NTER transitioned into the "development" phase

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[333] The *Aboriginal and Torres Strait Islander Act 2005* (Cth), s 3 provides:

> The objects of this Act are, in recognition of the past dispossession and dispersal of the Aboriginal and Torres Strait Islander peoples and their present disadvantaged position in Australian society:
>
> (a) to ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of government policies that affect them;
> (b) to promote the development of self-management and self-sufficiency among Aboriginal persons and Torres Strait Islanders;
> (c) to further the economic, social and cultural development of Aboriginal persons and Torres Strait Islanders; and
> (d) to ensure co-ordination in the formulation and implementation of policies affecting Aboriginal persons and Torres Strait Islanders by the Commonwealth, State, Territory and local governments, without detracting from the responsibilities of State, Territory and local governments to provide services to their Aboriginal and Torres Strait Islander residents.

[334] *See supra*, text accompanying note 274.

[335] ANAYA REPORT 2010, *supra* note 38, at para.16; McIntyre, *supra* note 159, at 109; CERD REPORT 2010, *supra* note 203.

[336] Macklin, *supra* note 97.

[337] *See, e.g.*, Working Group Draft Declaration, *supra* note 93; Barsh, *supra* note 26; Sanders, *supra* note 125.

[338] Little Children Are Sacred, *supra* note 14, at 16.

administered under the Closing the Gap in the Northern Territory National Partnership Agreement ("NTNPA").[339] The declaration of an 'emergency' was decades overdue, and welcome for the reason that it triggered unprecedented investment in service provision and infrastructure for indigenous communities–but Australia crashed the ambulance.[340] Even the Intervention's strongest supporters could hardly argue that any gains have been made specifically *because* the government chose to take a discriminatory and paternalistic approach, and that such an approach was necessary for that progress to be realized; the evidence to the contrary, that the approach was severely detrimental to the success of individual measures, is far more compelling.

## IV. MOVING ON: STRONGER FUTURES?

> *Where is all that self-determination, where has all that yäku (name) gone. You can change names [to Stronger Futures] to convince [us that things are better] but you are still following the same [track].*[341]

It is one thing to pick apart the 2007 NTER as a clear failure to respect and foster indigenous self-determination, but it must be acknowledged that the Intervention has changed shape over its lifetime,[342] and the efforts to improve participation and reinstate the RDA, albeit far from perfect in their execution, represent a positive sign that Australia has attempted to respond to some of the criticism of its original methodology. The million-dollar–or rather, 3.4 billion dollar[343]–question is whether Australia has truly learned from the serious backlash provoked by NTER and is prepared to make genuine efforts to align ongoing policies and legislative processes with the spirit of empowerment in UNDRIP.

With the commencement of the Stronger Futures consultations in June 2011, there appeared to be cause for optimism. It was another chance to start again. Shifts in the language used by government as it has moved

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[339] For an outline of the transition, see NTER EVALUATION REPORT 2011, *supra* note 171, at 71-74.

[340] Kay Boulden & John Morton, *Don't Crash the Ambulance, in* COERCIVE RECONCILIATION, *supra* note 162, at 163-170.

[341] Statement by Djuŋadjuŋa Yunupiŋu, Dalkarramirr for the Gumatj Nation, Apr. 24, 2012 (spoken in English and Yolŋu Matha and attached as Appendix 1 to Yolngu Nations Assembly), *available at* http://stoptheintervention.org/uploads/files_to_download/ Stronger-Futures/Yolngu-Statement-2-5-12.pdf.

[342] For a summary of how the welfare reforms have evolved over the life of NTER, see NTER EVALUATION REPORT 2011, *supra* note 171, at Appendix 9.A.

[343] This is the amount pledged for the *Stronger Futures* legislation (separate from income management) over the next ten years. *See* Jenny Macklin MP, Press Conference, June 29, 2012, *available at* http://www.jennymacklin.fahcsia.gov.au/node/1977 (last visited 11 July 11, 2012).

beyond the emergency phase of NTER into the development phase under the NTNPA have suggested Australia is keen to "reset the relationship" with indigenous peoples, and that it recognizes the importance of improving its approach to engagement, collaboration and partnership.[344] It is particularly significant that the Prime Minister has acknowledged the role that decades of under-investment in infrastructure and basic services for Aboriginal people have played in the entrenched disadvantage experienced today,[345] and it is encouraging that both the federal and NT governments have committed to ongoing investment and funding for increased services in communities, including parenting support, financial literacy services, substance abuse prevention, health, and education services.

The mere fact Australia was undertaking consultations on *Stronger Futures* was already a vast improvement on the early approach of NTER, and the large scale of the consultations (around 450 meetings across 100 communities, town camps and major towns) suggested an admirable attempt to ascertain the views of a wide range of different people.[346] The government commissioned an independent monitor to report on whether or not consultations were conducted in accordance with the government's consultation and communication strategies and were "open, fair and accountable." The report concluded that within its limited terms of reference those objectives had been satisfied, and that there were some practical improvements in the conduct of the meetings as compared to the 2009 redesign consultations.[347]

Despite these improvements, however, there remains serious cause for concern that the *Stronger Futures* consultations were inadequate, in terms of the standards set forth in UNDRIP. Transcripts of the consultations themselves,[348] numerous submissions to the Senate inquiry,[349] speeches by

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[344] *See, e.g.*, AUSTRALIAN GOVERNMENT: DEPT. OF FAMILIES, HOUSING, COMMUNITY SERVICES, & INDIGENOUS AFFAIRS, CLOSING THE GAP: ENGAGEMENT AND PARTNERSHIP WITH INDIGENOUS PEOPLE, *available at* http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/closing-the-gap/closing-the-gap-engagement-and-partnership-with-indigenous-people (last visited July 8, 2012); CGA, PRIME MINISTER'S REPORT, *supra* note 20; CGA, STRONGER FUTURES: POLICY STATEMENT, *supra* note 22. *See also* Northern Territory Government, Submission No. 403 to the Senate Community Affairs Committee Inquiry into the Stronger Futures in the Northern Territory Bill 2011 *and Two Related Bills*, *available at* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/strong_future_nt_11/submissions.htm (last visited July 11, 2012).

[345] *Closing the Gap: Prime Minister's Report*, *supra* note 20; *see also* Gaita, *supra* note 315.

[346] *See Stronger Futures in the Northern Territory Report on Consultations*, *supra* note 22.

[347] CULTURAL AND INDIGENOUS RESEARCH CENTRE AUSTRALIA, *Report on Stronger Futures Consultation 2011*, 27 (2011), *available at* www.fahcsia.gov.au/sites/default/files/documents/05_2012/circa_qa.pdf [hereinafter CIRCA Report 2011].

[348] For transcripts from a number of consultation meetings, see http://www.concernedaustralians.com.au/.

several senators at the second reading of the bills,[350] and public responses both before and after the legislation was passed[351] contradict the positive reports from the government, and indicate that there is a substantial amount of opposition to the new legislation. Again, the point here is not to critique the content of the new policies, but to examine at this early stage whether the government's methodology in developing and implementing Stronger Futures shows a move away from the mistakes of NTER.

In terms of the quality of consultations, the government's own review of NTER had acknowledged that "the timeframes imposed and the decision to consult after key decisions had already been taken were responsible for many of the problems in the early stages of NTER."[352] Yet these same criticisms, and many others that were familiar from the original NTER and the redesign consultations, have arisen again in respect of *Stronger Futures*– that the consultations operated on "Canberra" timeframes, with inadequate involvement of Aboriginal people in the planning of consultations, little or no notice of meetings, and insufficient time for detailed deliberation; that significant measures like income management were not listed for discussion; that information about the proposed measures was densely worded and complex, and provided with insufficient time for communities to give it proper consideration before the consultations; that there was inadequate use of interpreters, including a lack of translation of lengthy written materials

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[349] The Committee received 452 submissions and form letters from approximately 560 individuals. *Stronger Futures in the Northern Territory Bill 2011 [Provisions]; Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 [Provisions]*; *Social Security Legislation Amendment Bill 2011 [Provisions]*, SENATE COMMUNITY AFFAIRS LEGISLATION COMMITTEE 1 (Mar. 14, 2012) *available at* http://www.aph.gov.au/Parliamentary_Business/ Committees/Senate_Committees?url=clac_ctte/strong_future_nt_11/report/index.htm (last visited July 11, 2012). The submissions are available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/strong_future_nt_11/submissions.htm.

[350] *Stronger Futures* Senate Hansard 2012, *supra* note 183.

[351] *See, e.g.,* Nicholson et al., *supra* note 256; *Stronger Futures Forum Held at Maningrida on 21 February 2012* (Feb. 21, 2012), *available at* http://vimeo.com/37790315 (last accessed July 6, 2012); *Yolngu Nations Assembly*, *supra* note 341; STATEMENT OF THE NATIONAL CONGRESS OF AUSTRALIA'S FIRST PEOPLES TO UNPFII (May 2012), http://nationalcongress.com.au/wp-content/uploads/2012/05/120514UNFinal-Statement.pdf (last visited July 12, 2012); THE STRONGER FUTURES LEGISLATIVE PACKAGE: ASSESSMENT OF NON-COMPLIANCE WITH HUMAN RIGHTS, AUSTRALIAN LAWYERS' ALLIANCE, June 29, 2012, http://lawyersalliance.com.au/media/File/2_ALA_Statement_of_Non compliance.pdf [hereinafter "*Stronger Futures Assessment*"]; *Aboriginal Leaders Declare Day of Mourning*, THE AUSTRALIAN, June 27, 2012, http://www.theaustralian.com.au/news/breaking-news/aboriginal-leaders-declare-day-of-mourning/story-fn3dxity-1226409672043 (last visited July 12, 2012); *Stronger Futures Laws Condemned After Passing Senate*, ABC NEWS, June 29, 2012, http://www.abc.net.au/news/2012-06-29/stronger-futures-laws-rushed-through-senate/4100288 (last visited July 12, 2012). Various resources are also *available at* the website of the group *Concerned Australians*, http://www.concernedaustralians.com.au/.

[352] NTER EVALUATION REPORT 2011, *supra* note 171, at 41.

into Aboriginal languages; and that the sessions covered so many questions that there was no possibility of in depth discussion in the time available.[353]

These concerns and the many strong negative responses to the content of the legislation itself[354] indicate that the standards of participation in decision-making and free, prior, informed consent in Articles 18 and 19 UNDRIP have not been met; nor has the consultation process given adequate effect to the rights of Aboriginal people to be actively involved in the development and implementation of health, housing, economic and social programs, in connection with the exercise of their rights to development according to their own priorities (Article 23).

The inadequacies in the consultation process have important implications for the government's assertion that the key measures in the Stronger Futures in the Northern Territory Act 2012 amount to special measures.[355] As discussed above, special measures amount to "positive discrimination;" they are an exception to the definition of racial discrimination because they are taken for the sole purpose of advancing the rights of disadvantaged groups. The special measures justification is not substantiated in detail in the government's "Statement on compatibility with human rights" provided under the new Human Rights (Parliamentary Scrutiny) Act 2011.[356] However, even without delving into an assessment of the substance of the legislation, the lack of adequate prior consultation is enough on its own to disqualify these measures as "special measures" in accordance with the established criteria under international law,[357] that essential prerequisite being even more important in circumstances where the measures appear to confer a negative effect rather than a benefit on the target group.

If they are not genuine special measures, then it is clear that the *Stronger Futures* legislation is discriminatory, despite purporting not to "affect" the operation of RDA.[358] It seems that the legislation still operates on racially discriminatory assumptions–one being that Aboriginal people

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[353] *See* Nicholson et al., *supra* note 256; HREOC Submission 2012, *supra* note 349; CIRCA REPORT 2011, *supra* note 347.

[354] For numerous submissions to the Senate inquiry, see *supra* note 349.

[355] *Stronger Futures in the Northern Territory Act 2012* (Cth), ss 7, 33, 37 (Austl.); *Stronger Futures in the Northern Territory Bill* (Cth) (Austl.), *available at* http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/cth/bill_em/sfitntb2011536/memo_0.html?stem=0&synonyms=0&query=stronger%20futures (last visited Jan. 22, 2012).

[356] *See Stronger Futures Assessment*, *supra* note 351 (responding to the government's statement).

[357] For a more detailed analysis, see Nicholson et al., *supra* note 256, at 99-101, para. 242-47.

[358] *Stronger Futures in the Northern Territory Act 2012* (Cth), s 4A (Austl.). Whether or not this provision is strong enough to prevent the later act from prevailing over RDA in event of inconsistency remains to be seen. *See supra* note 215.

need centralized government to make decisions for them about matters such as food choices and alcohol management, and another being that all Aboriginal cultures across the NT are the same and will benefit from the blanket imposition of a "one-size-fits-all" approach. Both of these assumptions were challenged repeatedly during the consultation process, and it was clear that there is an ongoing perception that the legislation creates different rules for Aboriginal people as compared to other Australians.[359]

In the context of the present discussion, the ongoing plans for extending compulsory income management across Australia are particularly troubling. The evidence that compulsory income management is an effective means of addressing disadvantage is limited, with resulting positive changes reported as "uneven and fragile."[360] Again, the 2011 NTER Evaluation had documented the wide-reaching feelings of loss of control and disempowerment that resulted from the imposition of compulsory income management, and advocated a new approach that would "encourage local Indigenous social and cultural ownership"[361]–yet the new legislation not only continues compulsory income management but extends it to new categories of people and broadens executive power to roll the regime out further to new communities across Australia.[362]

At the time of writing it has only been a matter of days since the new legislation passed through the Senate, but there have been calls for the new acts to be subjected to the scrutiny of the new Joint Committee on Human Rights.[363] It is too early to comment on the implementation of the *Stronger Futures* initiatives, but the preliminary assessment of Australia's methodology through the development phase shows a troubling tendency to repeat the mistakes of the recent past. Once again, as with NTER, there are

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[359] *See* Nicholson et al.*, supra* note 19. See also the website of the group *Concerned Australians, supra* note 348, for transcripts of consultation meetings; *Stronger Futures Forum Held at Maningrida on 21 February 2012*, *supra* note 351.

[360] Buckmaster & Ey*, supra* note 268. There is some evidence suggesting that NTER welfare reforms had had some positive effects in making communities feel stronger, more sustainable and safer, particularly for women and children, but researchers have cautioned against reliance on the data without further research to counter the limitations of available evidence. *See also* NTER EVALUATION REPORT 2011, *supra* note 171; AIHW REPORT, *supra* note 259. On the other hand, there is evidence that many current participants do not understand the purpose of the scheme or why they are on it, that it has not caused them to change their spending habits or feel safer, and that they feel shame and a loss of dignity when using the BasicsCard and dealing with income managers. *See Women's Experience of Income Management in the Northern Territory, supra* note 233.

[361] NTER EVALUATION REPORT 2011, *supra* note 171, at 333-34.

[362] *Social Security Legislation Amendment Act 2012* (Cth) (Austl.).

[363] *See, e.g., Stronger Futures Assessment supra* note 351; *Congress Statement: Passage of the Stronger Futures Bills*, NATIONAL CONGRESS OF AUSTRALIA'S FIRST PEOPLES, June 29, 2011, http://nationalcongress.com.au/congress-statement-passage-of-the-stronger-futures-bills/ (last visited July 11, 2012).

concerns about a failure to facilitate genuine participation in decision-making in line with the standards embodied in UNDRIP, and the continued reliance on special measures to justify the blanket imposition of top-down measures is a worrying sign that the move to *Stronger Futures* has perpetuated and not cured the discriminatory origins of NTER.

Indeed, there is a real danger that the widely held perception that this is simply the Intervention being continued under another name will obscure community perceptions of the Stronger Futures policies; that no matter how progressive and beneficial they might be on their own terms, or how genuine the government's motives are in implementing them, community engagement will remain on the back foot because they are contaminated by the distrust and disillusionment engendered by the Intervention. The paramount importance of genuine and meaningful two-way consultations with communities cannot be overstated. Consultations are not just a formality to be ticked off a list, and it is unfortunate that moves to incorporate the HREOC guidelines for meaningful consultations into the legislation were not successful.[364]

## V. SUMMARY AND FINAL OBSERVATIONS

### *A. Recapitulation: UNDRIP and Self-Determination*

The right to self-determination is now unequivocally recognized as a right of indigenous peoples. Article 3 UNDRIP explicitly claims for indigenous peoples what was previously denied them by excluding them from the meaning of "all peoples" in international law. This provides an opportunity to unify competing understandings of the right and resolve inequalities, drawing on established norms while smoothing over historical areas of contention. This article advocates interpreting self-determination in a manner specific enough to be capable of useful application in any given case, but flexible enough to accommodate different circumstances: as the right of peoples to control their own affairs through meaningful participation in decision-making and freedom from discrimination.

This fundamental relationship between non-discrimination and participation on the one hand and the right to self-determination on the other, exists both in the latter's traditional form under general international law and in the indigenous context. The consistent foundation of participation and non-discrimination shows that indigenous self-determination and traditional self-determination share the same origins and rationale, and are not as

[364] *Stronger Futures* Senate Hansard 2012, *supra* note 183, at 72-73, 126-28.

divergent as some maintain. The scope of self-determination for indigenous peoples must also be interpreted as equal: there is no reason to restrict it to internal self-determination, because external self-determination is already tightly circumscribed for everyone under international law. The alternative approach that views self-determination as a matter of substance and remedy, instead of internal and external aspects, supports this argument. Secession by indigenous peoples is unlikely, but equality in the range of remedies available is vital, if the international community is genuine in its acceptance of indigenous peoples as "peoples."

This article has argued that UNDRIP supplements the long-established foundations of self-determination by adding a crucial element of empowerment to the indigenous rights framework, particularly through its enhanced standards of internal participation and informed consent that complement and transcend established norms of political participation. The shift towards empowerment is inherent in the hard-won confirmation, after decades of battling over the "s,"[365] that indigenous peoples are indeed "peoples," equal to "all peoples," and entitled to the same rights. UNDRIP recognizes that indigenous peoples may need preferential treatment in some circumstances–not to live better than anyone else, but merely so they can "'live like' everyone else."[366] It strengthens the indigenous rights framework by bringing the standards together in one place, and has also had an impact on the development of human rights law more generally.[367]

Practically speaking, the specifics of self-determination will be worked out on a case-by-case basis at national, regional and local levels. The simple definition of self-determination advocated in this article helps facilitate that task. A flexible interpretation of the right to participation and the continuum of options for its expression, and a commitment by the state to genuine freedom from discrimination, will mean that enjoyment of these two rights together is sufficient to guarantee empowerment and self-determination as required by UNDRIP. It will require good faith negotiations between indigenous representatives and states to define the exact parameters of the exercise of the right alongside other peoples in each case.[368] Litigation will also undoubtedly play a central role.[369]

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[365] Wiessner, *supra* note 4, at 116-17.

[366] "Declaration Press Release," *supra* note 48 (quoting David Choquehuanca, Bolivian Foreign Affairs Minister).

[367] XANTHAKI, *supra* note 29.

[368] *See* Murphy, *supra* note 2. Contrast Scott, *supra* note 25 (arguing that negotiating relationships is at the core of what it means to be self-determining), with Quane, *supra* note 31 (arguing that the notion of self-determination as something to be negotiated, instead of absolute, is a new development).

[369] *See* Clive Baldwin & Cynthia Morel, *Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation, in* REFLECTIONS ON THE UNDRIP, *supra* note 12, at 121-43.

### *B. Lessons from Australia*

In the second part of the article, the NT Intervention came under scrutiny as a controversial example of domestic efforts to address indigenous disadvantage that arose the year UNDRIP was adopted by the G.A. The interpretation of self-determination developed in the first part of the article was applied as the normative criteria for examining Australia's NTER methodology in light of evolving international norms. Questions of legal obligation aside, it is clear that Australia's treatment of its indigenous peoples in NT was a denial of self-determination, as it persisted in "criminalising poverty"[370] while applying paternalistic methods that denied indigenous peoples the opportunity for genuine engagement in conditions of equality. NTER as a whole, and the compulsory income management regime in particular, violated the well-established prohibition on racial discrimination, did not amount to special measures, and fell well short of the enhanced standards of internal participation under UNDRIP.

Australia claimed that the Intervention represented a radical new strategy for the protection of indigenous Australians' rights.[371] Unfortunately, any positive effects of the "stabilisation" and "normalisation" phases of NTER were ambiguous at best,[372] and certainly not attributable to the decision to proceed in a racially discriminatory manner without any attempt at consultation; by contrast, the negative effects of Australia's approach have been significant.[373] Rather than a new approach, history seemed to be repeating itself in Australia,[374] with Aboriginal rights protections taking a step backwards despite the progress being made at the international level.

The point of this article has not been simply to condemn the discriminatory and paternalistic aspects of NTER as an obvious example of how *not* to proceed, however. Its contribution is to serve as a warning and a plea, that the same mistakes must not be continued as Australia leaves NTER behind and transitions to the new Stronger Futures. With the legislative

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[370] Watson, *supra* note 143, at 4, 14.

[371] Second Reading NTER*, supra* note 161, at 10; Billings, *supra* note 141.

[372] AIHW REPORT, *supra* note 259; CIRCA REPORT 2009, *supra* note 183; Watson, *supra* note 143; Cobb, *supra* note 30; Billings, *supra* note 141. *See also* NTER EVALUATION REPORT 2011, *supra* note 171.

[373] *See Closing the Gap in the Northern Territory: Monitoring Report January-June 2011*, DEPT. OF FAMILIES, HOUSING, CMTY. SERVICES AND INDIGENOUS AFFAIRS, http://www.fahcsia.gov.au/sites/default/files/documents/05_2012/ctg_nt_monitoring_rpt_pt1_janjun11.pdf (last visited Oct. 16, 2011); *Gillard Can't Face Gruesome Intervention Facts–Sydney Protest Planned*, STOP THE INTERVENTION, June 10, 2011, http://stoptheintervention.org/facts/press-releases/gillard-cannot-face-gruesome-intervention-facts-sydney-protest-planned-10-6-11 (last visited Oct. 16, 2011); NTER EVALUATION REPORT 2011, *supra* note 171.

[374] Billings, *supra* note 141; Billings, *supra* note 166; Sutton, *supra* note 166; Chesterman & Douglas, *supra* note 2.

package replacing NTER having just been passed, Australia must not lose this opportunity to turn self-determination into something more than a distant memory of a failed experiment in Australian indigenous policy.[375] Self-determination must be given a chance.[376]

The bottom line is that the socio-economic problems in NT will never be solved without genuine empowerment, and commitment to an ongoing partnership: "[y]ou cannot drive change into a community and unload it off the back of a truck."[377] Australia must make concerted efforts to show that its endorsement of UNDRIP in 2009, and the national apology,[378] were more than mere political gestures, and to demonstrate a commitment to doing what works in the long term. As Little Children Are Sacred said, the problems in Aboriginal communities are not new, and the answers are obvious–"everybody knows the problems and solutions."[379] Australia has all the tools it needs to implement the standards of non-discrimination, participation and self-determination in UNDRIP. It is a matter of political will as to whether all the advice is acted upon.

Current steps towards constitutional amendment,[380] options for increasing indigenous political representation,[381] and the long-awaited establishment of a national indigenous representative body[382] all have

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[375] Past state attempts to establish Aboriginal self-determination in remote communities tended towards separatism, an approach still favoured by current opponents of Aboriginal self-determination. *See, e.g.,* Johns, *supra* note 57; Partington, *supra* note 141. Such attempts exacerbated problems because they were not coupled with adequate support and systems of accountability. *See* Etherington, *supra* note 150; Megan Davis, *The 'S' Word and Indigenous Australia: A New Variation of an Old Theme*, 31 AUS. J. LEGAL PHIL. 127 (2006).

[376] Behrendt, *supra* note 183, at 127.

[377] Review Board Report, *supra* note 24, at 58.

[378] On February 13, 2008, then Prime Minister Kevin Rudd did what his predecessor Howard had refused to do and apologized to the Aboriginal peoples, on behalf of Australia, for the Stolen Generations. The text of the apology is available at http://www1.aiatsis.gov.au/exhibitions/apology/sorry.html.

[379] Little Children are Sacred, *supra* note 14, at 13.

[380] *See* Larissa Behrendt, *Indigenous rights and the Australian Constitution: a litmus test for democracy* (Conference Papers, *Constitutions and Human Rights in a Global Age: An Asia-Pacific Perspective*, 2001), *available at* http://rspas.anu.edu.au/pah/human_rights/papers/2001/Behrendt.pdf; Garth Nettheim, *Indigenous Australian Constitutions*, 24 UNIV. NEW SOUTH WALES L.J. 840 (2001); Barbara Ann Hocking, Scott Guy & Jason Grant Allen, *Three Sorries and You're In? Does the Prime Minister's Statement in the Australian Federal Parliament Presage Federal Constitutional Recognition and Reparations?*, 11 HUM. R. REV. 105 (2010). In December 2010, Australia established an Expert Panel to consult on constitutional recognition of indigenous Australians. The Panel's report was delivered to the Prime Minister on January 19, 2012. FINAL REPORT OF THE EXPERT PANEL, RECOGNISING ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES IN THE CONSTITUTION, http://www.youmeunity.org.au/final-report (last visited Jan. 22, 2012).

[381] *See* Sanders, *supra* note 125; Murphy, *supra* note 2; EMRIP REPORT, *supra* note 273.

[382] Sanders, *supra* note 125; HREOC, *Our Future in Our Hands: Creating a Sustainable National Representative Body for Aboriginal and Torres Strait Islander Peoples*, AUS. HUM. RTS. COMM'N (2009), *available at* http://www.hreoc.gov.au/social_justice/repbody/report2009/index.html (last visited Apr. 7, 2011); CERD REPORT 2010, *supra* note 203; See the website of the National Congress of Australia's First

potential to strengthen human rights protection for Aboriginal Australians, and to help bring Australia into line with the emerging norms of international law under UNDRIP. But with suggestions in 2011 that a "second Intervention" might be contemplated to address spiralling crime in Alice Springs,[383] the importance of engagement and learning from past mistakes cannot be overstated. The idea of a second Intervention does not seem to have taken hold as such, but numerous people have expressed the view that the *Stronger Futures* legislation amounts to just that–"it is using a different name, but the formula is the same"[384]–with Australia choosing to retain and extend various objectionable features of the Intervention in its new legislation despite serious opposition. From the early indications it could not be said that *Stronger Futures* facilitates indigenous self-determination in NT, and it seems likely that the new legislation will be challenged.

### *C. Broader Implications*

Of more general relevance internationally, NTER analysis shows that measuring a state's compliance against established international standards of non-discrimination and participation may in some cases be enough to assess whether the goal of indigenous self-determination is being achieved.[385] This has the potential to open up avenues for redress that might otherwise be denied because the state refuses to recognize a legal obligation in respect of self-determination itself. Although the question of remedies is beyond the scope of this article, it is worth noting that states like Australia do not help themselves by inhibiting the substantive self-determination of their indigenous peoples, because that is when contentious issues of remedial self-determination arise.[386] UNDRIP itself contains numerous provisions on the right to redress that will become increasingly important as the indigenous rights framework develops.[387]

It goes without saying that implementing UNDRIP is the next significant challenge for advancing indigenous rights, in Australia and around the world. It will not be easy, and it will not happen quickly.

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Peoples, http://nationalcongress.com.au/ (last visited Jan. 18, 2013). It is hoped that the National Congress will have more success than the ill-fated Aboriginal and Torres Strait Islander Commission, which was abolished in 2005.

[383] Patricia Karvelas, *Tony Abbott Calls For New Intervention in Alice Springs*, THE AUSTRALIAN, Mar. 21, 2011.

[384] *See Stronger Futures Forum Held at Maningrida on 21 February 2012*, *supra* note 351.

[385] The relevant standard of participation will depend on whether the state is party to ILO Convention 169 and therefore legally bound to ensure internal as well as political participation.

[386] *See supra* notes 115-21 and accompanying text.

[387] *E.g.*, arts. 8(2), 11(2), 20(2), 28, 32(3).

Changes to the status quo need to take account of the combined legal and political nature of the issues involved.[388] More generally, states must recognize that increased partnership with indigenous peoples will only strengthen and serve democracy and stability within their territories, not undermine it.[389] Indigenous self-determination should not be seen as an unachievable dream, or a mere "indulgent fantasy."[390] The immense political complexities involved will not dissolve overnight, and UNDRIP does not yet have legally binding status, but it must be seen as providing significant impetus for what Daes calls "belated state-building."[391] Models for success already exist,[392] and the literature is full of suggestions for implementation.[393] Indeed, there are sure signs that UNDRIP is starting to have some impact.[394] Indigenous peoples themselves will and must play a central role in the ongoing development of their rights framework, and through UNPFII, they now have a permanent voice at a high level of the UN. The adoption of UNDRIP was the culmination of a long struggle, but it is just the beginning of indigenous re-empowerment.

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[388] Otto, *supra* note 2, at 93; Tennant, *supra* note 10; Brownlie, *supra* note 1. [389] *See* Inter-American Democratic Charter, Organization of American States, Sept. 11, 2001 art. 6 (Lima, Peru); Barsh, *supra* note 26, at 799.

[389] *See* Inter-American Democratic Charter, Organization of American States, Sept. 11, 2001 art. 6 (Lima, Peru); Barsh, *supra* note 26, at 799.

[390] Langton, *supra* note 144.

[391] Daes, *supra* note 50, para. 26; Anaya Report 2008, *supra* note 30. *See also* Dodson & Strelein, *supra* note 2.

[392] *See, e.g.*, Baer, *supra* note 108; XANTHAKI, *supra* note 29, at 165; Howard-Wagner, *supra* note 2; EMRIP Report, *supra* note 273.

[393] *See, e.g.*, Anaya (2000), *supra* note 35; REFLECTIONS ON THE UNDRIP, *supra* note 12; Tauli-Corpuz, *supra* note 29; UNDG Guidelines, *supra* note 278; Sanders, *supra* note 125; ANAYA REPORT 2008, *supra* note 30.

[394] Various institutions, courts, and litigants referred to its principles before it was adopted. *See, e.g.,* Dann v. United States, *supra* note 124; Endorois v. Kenya, *supra* note 130, para. 155, 207; *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, U.N. Doc. E/C.12/1/Add.94 at 11 (Dec. 12, 2003); Eide, *supra* note 4, at 207; REFLECTIONS ON THE UNDRIP, *supra* note 29, at 120; Baldwin & Morel, *supra* note 369. The Philippines modeled its comprehensive Indigenous Peoples' Rights Act on the draft Declaration in 1997. *See* Tauli-Corpuz, *supra* note 29. Since its adoption, UNDRIP has inspired constitutional and legislative reform in states including Bolivia, Nepal, Japan, Ecuador, and Canada. *See* Barelli, *supra* note 30, at 982. It has been referred to in cases at national and regional levels. *See, e.g.*, *Cal & Coy v. A-G of Belize* (consolidated), Belize Supreme Court, claims 171, 172 (Oct. 18, 2007) (per Coneh C.J.), paras 131-33; *Wurridjal v. Australia* [2009] HCA 2 (per Kirby J., dissenting), at para. 269; Endorois v. Kenya, *supra* note 130, at para. 83; Saramaka v. Suriname, *supra* note 130, at para. 131.